92-1481

No. 93-

Supreme Court, U.S.
FILED
MAR 12 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KONRAD RADASZEWSKI, by CECILIA RADASZEWSKI,
His Guardian,
Petitioner,

v.

TELECOM CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR WRIT OF CERTIORARI

MAX W. FOUST
JAMES P. FRICKLETON *
JULIE C. FRICKLETON
BART L. STROTHER
1100 Maine Street, Suite 2300
Kansas City, Missouri 64105
(816) 474-6050
Counsel for Petitioner

* Counsel of Record

March 12, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Did the Court of Appeals subject petitioner, who was faced with a Rule 12(b)(2) jurisdictional challenge, to an unfair and inappropriate burden of proof when it, sua sponte, and without prior notice to the parties, transformed the motion into one for summary judgment under Rule 56 and made factual determinations on the merits?

2. Did the Court of Appeals contravene Missouri law and public policy by holding that the purchase of insurance, regardless of the source or amount, completely relieves a parent corporation of its duty to adequately capitalize its insolvent subsidiary?

LIST OF PARTIES

In addition to petitioner and respondent, the following were parties (defendants) to the original action:

Contrux, Inc.

Dan Leslie Satterfield (Employee of Contrux and driver of the truck that injured petitioner.)

Flexi-Van, Inc. (Lessor of truck to Contrux, guaranteed by Telecom.)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND RULES INVOLVED	1
STATEMENT OF THE CASE	1
A. The Accident	1
B. Proceedings in the Lower Courts	2
REASONS FOR GRANTING THE WRIT	5
I. THE COURT OF APPEALS' DECISION ADDS TO THE GROWING CONFUSION IN THE FEDERAL COURTS REGARDING A TORT PLAINTIFF'S BURDEN OF PROOF AT THE PRETRIAL STAGE	5
A. The Lower Courts Applied an Incorrect Standard of Review to a Motion To Dismiss for Lack of Personal Jurisdiction	16
B. The Court of Appeals' Holding Cannot Be Reconciled With This Court's Guidelines Regarding Summary Judgment	15
II. THE COURT OF APPEALS PLAINLY IGNORED CONTROLLING STATE LAW, CAUSING A DANGEROUS DEPARTURE FROM NATIONALLY ACCEPTED LEGAL PRINCIPLES AND WEAKENING THE PUBLIC'S PROTECTION FROM INSOLVENT CORPORATIONS	21
CONCLUSION	28

TABLE OF AUTHORITIES

CASES: Page

Aaron Ferer & Sons Co. v. *Diversified Metals Corp.*, 564 F.2d 1211 (8th Cir. 1977) 7
Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) .. 16, 18
Anderson v. *Abbott*, 321 U.S. 349 (1944) 24, 26, 29
Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) .....*passim*
Atlas Construction Co. v. *Slater*, 746 P.2d 352 (Wyo. 1987) 17
Auglaize Boxboard Co. v. *Henton*, 126 N.E. 881 (Ohio 1919) 20
Bangor Punta Operations, Inc. v. *Bangor & Aroostook R. Co.*, 417 U.S. 703 (1974) 26
Barclays Leasing, Inc. v. *National Business Systems, Inc.*, 750 F. Supp. 184 (W.D.N.C. 1990) 7
Behagen v. *Amateur Basketball Assoc. of U.S.A.*, 744 F.2d 731 (10th Cir. 1984) 7
Bennett v. *Berg*, 685 F.2d 1053 (8th Cir. 1982) 14
Berardinelli v. *Castle & Cooke, Inc.*, 587 F.2d 37 (9th Cir. 1978) 9
Bialek v. *Racal-Milgo, Inc.*, 545 F. Supp. 25 (S.D. N.Y. 1982) 9, 10
Block Industries v. *DHJ Industries, Inc.*, 495 F.2d 256 (8th Cir. 1974) 9
Boddie v. *Connecticut*, 401 U.S. 371 (1971) 8, 14
Breiner Equipment Co. v. *Dynaquip, Inc.*, 539 F. Supp. 204 (E.D. Mo. 1982) 7
Bucyrus-Erie Co. v. *General Products Corp.*, 643 F.2d 413 (6th Cir. 1981) 26, 29
Celotex Corp. v. *Catrett*, 477 U.S. 317 (1986) 6, 13
Central Communications, Inc. v. *City of Jefferson City, Mo.*, 589 F. Supp. 85 (W.D. Mo. 1984) 6, 13
Central Investment Corp. v. *Mutual Leasing Assoc., Inc.*, 523 F. Supp. 74 (S.D. Ohio 1981) .. 7, 11
Collet v. *American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986) .....*passim*
Conley v. *Gibson*, 355 U.S. 41 (1957) 12
Consolidated Sun Ray, Inc. v. *Oppenstein*, 335 F.2d 801 (8th Cir. 1964) 17
Cummings v. *HCA Health Services of Texas, Inc.*, 799 S.W.2d 403 (Tex. App. 1990) 17

TABLE OF AUTHORITIES—Continued

Page

Data Disc, Inc. v. *Systems Technology Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977) ..... *passim*
Daval Steel Products v. *M.V. Juraj Dalmatinac*, 718 F. Supp. 159 (S.D.N.Y. 1989) 7
DeWitt Truck Brokers v. *W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4th Cir. 1976) 17, 25
E.C. Alford v. *National Post Office Mail Handlers*, 576 F. Supp. 278 (E.D. Mo. 1983) 14
Eagle Transport, Ltd., Inc. v. *O'Connor*, 470 F. Supp. 731 (S.D.N.Y. 1979) 19
Eastridge Development Co. v. *Halpert Assoc., Inc.*, 853 F.2d 772 (10th Cir. 1988) 24, 29
Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) 22, 28
Flynt Distributing Co., Inc. v. *Harvey*, 734 F.2d 1389 (9th Cir. 1984) 7, 17
George W. Bennett Bryson & Co., Ltd. v. *Norton Lilly & Co., Inc.*, 498 F.2d 328 (5th Cir. 1974) .. 27
Grote Meat Co. v. *Goldenberg*, 735 S.W.2d 379 (Mo. App. 1987) 21, 22
H.H. Robertson Co. v. *V.S. DiCarlo General Contractors, Inc.*, 789 F. Supp. 998 (E.D. Mo. 1992) 21, 22, 27
Hanson Southwest Corp. v. *Dal-Mac Construction Co.*, 554 S.W.2d 712 (Tex. App. 1977) 12
Hishon v. *King & Spalding*, 467 U.S. 69 (1984) 12
Hoffman v. *United Telecommunications, Inc.*, 575 F. Supp. 1463 (D. Kan. 1983) 7
Hughes v. *American Jawa, Ltd.*, 529 F.2d 21 (8th Cir. 1976) 19
In re: Fabricators, Inc., 926 F.2d 1458 (5th Cir. 1991) 24
In re: IOTA Industries, Inc., 35 B.R. 693 (S.D. N.Y. 1983) 17
In re: Mobile Steel Co., 563 F.2d 692 (5th Cir. 1977) 24
Institutional Food Marketing Assoc., Ltd. v. *Golden State Strawberries, Inc.*, 747 F.2d 448 (8th Cir. 1984) 9
International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 7

TABLE OF AUTHORITIES—Continued

	Page
Jenkins v. *McKeithen*, 395 U.S. 411 (1969)	12
Kirvo Industrial Supply Co. v. *National Distillery & Chemical Corp.*, 483 F.2d 1098 (5th Cir. 1973)	26
Kramer v. *Keyes*, 643 F.2d 382 (5th Cir. 1981)	27
Kuhlmeier v. *Hazelwood School District*, 578 F. Supp. 1286 (E.D. Mo. 1984)	14
Marine Midland Bank, N.A. v. *Miller*, 664 F.2d 899 (2d Cir. 1981)	10
May Dept. Stores v. *Union Electric Light & Power Co.*, 107 S.W.2d 41 (1937)	22
McBeath v. *Inter-American Citizens for Decency Committee*, 374 F.2d 359 (5th Cir. 1967)	9
McLain v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980)	12
Miles v. *AT&T*, 703 F.2d 193 (5th Cir. 1983)	12
Miller v. *Central Chinchilla Group, Inc.*, 494 F.2d 414 (8th Cir. 1974)	9
Mortensen v. *First Federal Savings & Loan Assoc.*, 549 F.2d 884 (3rd Cir. 1977)	8
Myers v. *Johns Manville Sales Corp.*, 600 F. Supp. 977 (D. Nev. 1984)	8, 9
National Marine Service, Inc. v. *C.J. Thibodeaux & Co.*, 501 F.2d 940 (5th Cir. 1974)	26
Neitzke v. *Williams*, 490 U.S. 319, 109 S. Ct. 1827 (1989)	12
Nelson v. *R. Greenspan & Co., Inc.*, 613 F. Supp. 342 (E.D. Mo. 1984)	6
Newport Components, Inc. v. *NEC Home Electronics (USA), Inc.*, 671 F. Supp. 1525 (C.D. Cal. 1987)	7
Northern Illinois Gas Co. v. *Total Energy Leasing Corp.*, 502 F. Supp. 412 (E.D. Ill. 1980)	26
Omaha Indemnity Co. v. *Royal American Managers, Inc.*, 755 F. Supp. 1451 (W.D. Mo. 1991)	22
Pocahontas First Corp. v. *Venture Planning Group*, 572 F. Supp. 503 (D. Nev. 1983)	10
Poller v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962)	19

TABLE OF AUTHORITIES—Continued

Page

Ross v. *Bernhard*, 396 U.S. 531 (1970) 14
Sabine Towing & Transportation Co., Inc. v. *Merit Ventures, Inc.*, 575 F. Supp. 1442 (E.D. Tex. 1983) 19
Scheuer v. *Rhodes*, 416 U.S. 232 (1974) 12
Six Companies v. *Highway District*, 311 U.S. 180 (1940) 22
Snyder v. *United States*, 717 F.2d 1193 (8th Cir. 1983) 19
Southwest Investments I v. *Midland Energy Co., Inc.*, 596 F. Supp. 219 (E.D. Mo. 1984) 12
State ex rel. Deere & Co. v. *Pinnell*, 454 S.W.2d 889 (Mo. banc 1970) 8
Stephenson v. *Barringer*, 758 F. Supp. 657 (D. Kan. 1991) 7
Steven v. *Roscoe Turner Aeronautical Corp.*, 324 F.2d 157 (7th Cir. 1963) 29
Stoner v. *New York Life Ins. Co.*, 311 U.S. 464 (1940) 23
Strong v. *RG Industries, Inc.*, 691 F. Supp. 1017 (S.D. Miss. 1988) 7
Sun World Lines, Ltd. v. *March Shipping Corp.*, 585 F. Supp. 580 (E.D. Mo. 1984) 6
Surowitz v. *Hilton Hotels Corp.*, 383 U.S. 363 (1966) 9
Swall v. *Custom Automotive Services, Inc.*, 831 S.W.2d 237 (Mo. App. 1992) 22, 27, 28
Talen's Landing, Inc. v. *M/V Venture II*, 656 F.2d 1157 (5th Cir. 1981) 27, 29
Tax Lease Underwriters, Inc. v. *Black Green Ltd.*, 613 F. Supp. 1082 (E.D. Mo. 1985) 8, 9
Taylor v. *Portland Paramount Corp.*, 383 F.2d 624 (9th Cir. 1967) 13
Terre du Lac Association, Inc. v. *Terre du Lac, Inc.*, 737 S.W.2d 206 (Mo. App. 1987) 28
Texas Industries, Inc. v. *Lucas*, 634 S.W.2d 748 (Tex. App. 1982) 12
Thomas W. Garland, Inc. v. *City of St. Louis*, 596 F.2d 784 (8th Cir. 1979) 12

TABLE OF AUTHORITIES—Continued

Page

Thornhill Publishing Co., Inc. v. *General Telephone & Electronic Corp.*, 594 F.2d 730 (9th Cir. 1979) 9
United States v. *Healthwin-Midtown Convalescent Hospital & Rehabilitation Center, Inc.*, 511 F. Supp. 416 (C.D. Cal. 1981) 26
United States v. *Golden Acres, Inc.*, 702 F. Supp. 1097 (D. Del. 1988) 12
Welsh v. *Gibbs*, 631 F.2d 436 (6th Cir. 1980) 7
West v. *Costen*, 558 F. Supp. 564 (W.D. Va. 1983) 12, 17, 27
Williams-Berryman Ins. Co., Inc. v. *Morphis*, 461 S.W.2d 577 (Ark. 1971) 20

CONSTITUTIONAL PROVISIONS:

U.S. Const., Amend. VII 1, 14
U.S. Const., Amend. XIV 1, 14

STATUTES:

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1292(b) 3
Fed. R. Civ. P. Rule 12(b) 6
Fed. R. Civ. P. Rule 12(b)(2) ..... *passim*
Fed. R. Civ. P. Rule 12(b)(6) 2, 6
Fed. R. Civ. P. Rule 56 ..... 1, 4, 5, 14, 15
Mo. Rev. Stat. § 506.500 (Supp. 1984) 7

OTHER AUTHORITIES:

Douglas and Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929) 12, 20
Gelb, *Piercing the Corporate Veil-The Undercapitalization Factor*, 59 Chicago-Kent L. Rev. 1 (1982) 18
Salomon, *Limited Limited Liability: A Definitive Judicial Standard For The Inadequate Capitalization Problem*, 47 Temple L. Q. 321 (1974) 15, 17, 25

TABLE OF AUTHORITIES—Continued

Page

Sinclair, *Systematizing Piercing The Corporate Veil*, Oct./Nov. 1988 Mo. Bar J. 423 (1988) 27
Ballentine on Corporations, (1946 Ed.) 27
C. Wright & A. Miller, *Federal Practice & Procedure* (1990) 7

PETITION FOR WRIT OF CERTIORARI

Konrad Radaszewski, by his guardian Cecilia Radaszewski, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 981 F.2d 305 (8th Cir. 1992) and is reprinted at Appendix A. The Eighth Circuit's order denying rehearing, along with other orders of the district court and the court of appeals, are reprinted at Appendices B through D.

JURISDICTION

The decision of the Eighth Circuit Court of Appeals was filed on November 12, 1992. A timely motion for rehearing was denied on December 14, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This tort case involves the application of Missouri common law, as set out below, by federal courts; the Federal Rules of Civil Procedure (particularly Rules 12(b)(2) and 56); and the Seventh and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. The Accident.

While on summer vacation on August 21, 1984, Konrad Radaszewski, a native of Almond, Wisconsin, was stopped on the shoulder of Interstate Highway 70 in Independence, Missouri, tending to his disabled motorcycle. At that time, an 18-wheel tractor-trailer unit driven by Dan Leslie Satterfield, an employee of Contrux, Inc., while speeding on the rain-soaked highway jack-knifed out of

control and collided with Radaszewski. As a result of that impact, Konrad Radaszewski now spends 24 hours a day in a hospital bed or wheelchair. He is a brain damaged spastic quadriplegic. He can communicate only with the aid of a computer board and needs 24 hour attendant care to stay alive.

At all times, Contrux, Inc. was a wholly owned undercapitalized subsidiary of Telecom Corporation. Contrux was formed for the sole purpose of creating a non-union over-the-road carrier to replace Spector Red Ball, a unionized subsidiary of Telecom. At its inception and throughout its short lifetime, Contrux was completely controlled by Telecom and was simply a grossly undercapitalized shell corporation. As a result of this factual milieu, Radaszewski filed an action against Telecom Corporation directly, seeking redress for the severe damages he incurred at the hands of Contrux.

B. Proceedings in the Lower Courts.

The ruling at issue represents the second appeal to the Eighth Circuit. Initially, Telecom filed a motion to dismiss petitioner's complaint for lack of jurisdiction under Fed. R. Civ. P. 12(b)(2) and for failure to state a claim under 12(b)(6). The district court held that petitioner could not assert jurisdiction over Telecom without piercing the corporate veil. Presumably, the other requirements of due process and the state long arm statute have been met. The parties and courts below agree that the appropriate standard for piercing the corporate veil in Missouri is set forth in the case of *Collet* v. *American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986):

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own;

(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 284.

The district court granted Telecom's motion to dismiss for lack of personal jurisdiction under 12(b)(2), on the grounds that the first element of the *Collet* test, control, had not been met. App. D. This ruling was certified for interlocutory appeal under 28 U.S.C. § 1292(b), and reversed by the Eighth Circuit Court of Appeals. App. C. The cause was then remanded for additional discovery on the issues of control and undercapitalization, in order to support the first and second elements, respectively.

After allowing additional discovery, the district court reconsidered the motion to dismiss and again granted it under Fed. R. Civ. P. 12(b)(2), holding that plaintiff had made a sufficient showing as to the first and second elements of the *Collet* test, but that the third element, proximate cause, had not been met because plaintiff's loss had not yet been reduced to judgment and, therefore, did not represent a liquidated claim. App. B. The district court based its holding on discovery materials and the uncontradicted affidavit of a qualified CPA and financial analyst who stated that Contrux was, in fact, grossly undercapitalized from its inception and throughout its existence. The dismissal was without prejudice, presumably on the theory that, if Radaszewski should prevail at trial against the subsidiary, and if the judgment should ultimately turn out to be uncollectible, he could then refile against Telecom. Again, the dismissal was certified for interlocutory appeal under 28 U.S.C. § 1292(b) and the court of apepals affirmed, albeit on a completely different

basis [1] than the district court, and adding that it was now *with* prejudice. App. A.

The court of appeals, after a lengthy factual discussion, held that plaintiff had made a sufficient showing as to control, but failed to satisfy the *second* element of the *Collet* test. Specifically, the court of appeals adopted the parent corporation's line of defense that Contrux, although admittedly undercapitalized, had purchased some liability insurance and, therefore, this precluded any finding of improper purpose or intent on the part of Telecom as a matter of law. Requiring this type of subjective finding directly conflicts with controlling state law (and with virtually every other jurisdiction). Indeed, prior to this ruling, the district court had agreed that undercapitalization alone satisfies the second prong of the Missouri test. Throughout these fact-laden proceedings, all rulings have been based on Rule 12(b)(2) of the Federal Rules of Civil Procedure, although the court of appeals ostensibly chose to apply the Rule 56 standards for summary judgment in coming to its final conclusions. The procedural transformation of this matter is among the issues presented in this petition.

---

[1] The Eighth Circuit did not address the district court's opinion as to the third element. App. A, *infra*, at 4a. In his well reasoned dissent, Senior Circuit Judge Heaney notes that the district court's decision as to the third element is inconsistent with Missouri law. "It is clear when the action of the dominant corporation renders the subservient corporation insolvent, then the requisite injury and causal connection is established." Quoting *Collet* v. *American National Stores, Inc.*, 708 S.W.2d 273, 287 (Mo. App. 1986). Judge Heaney also adds that "it makes little sense to have two trials when all issues can be resolved in one." App. A at 17a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION ADDS TO THE GROWING CONFUSION IN THE FEDERAL COURTS REGARDING A TORT PLAINTIFF'S BURDEN OF PROOF AT THE PRETRIAL STAGE.

In *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), a divided Court held that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that govern the case. *Id.* at 255. According to the majority, "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 254. The dissenters argued that this new approach to summary judgment, which requires the court to assess the "quantum" of evidence presented by the non-moving party, would lead to impermissible fact-finding by the judge and put counsel for the non-moving party in a quandary as to how much evidence he will need to present at the pretrial stage. *Id.* at 267, 269-273.

The case at bar illustrates this problem and takes it one step further. Here, the petitioner was faced with a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, which historically would place a minimal evidentiary burden on him. See *infra*. Instead, petitioner was blind-sided by the court of appeals, who transformed this jurisdictional challenge into a factual analysis of the merits, without prior notice to the parties. The court of appeals rejected the prima facie standard required by Rule 12(b)(2) as "confusing" and proceeded to utilize a preponderance of the evidence standard under Rule 56.[2] Surely, the *Anderson* majority did not intend this result. While the use of the "prism" may be appropriate when the parties knowingly enter the evidentiary battle on a written motion for summary judgment, it cannot be justified when a court, sua sponte, transforms a jurisdictional challenge under 12(b)(2) into a Rule 56 motion without

[2] App. A at 11a-12a.

advance notice to the non-moving party.[3] Application of *Anderson* to "transformed" cases would represent a serious departure from well-settled law regarding the standards for motions to dismiss, and could lead to a greater burden for all district courts if every plaintiff faced with a jurisdictional challenge were forced to present mountains of evidence and affidavits out of fear of a procedural transformation[4] which would result in the judge's weighing of the parties' substantive evidence. Although petitioner maintains that he did present evidence showing a genuine issue of material fact in this case, the federal courts clearly need guidance as to the proper burden of proof, especially in light of *Anderson* and the conflict between the circuits on this point.[5]

A. The Lower Courts Applied an Incorrect Standard of Review to a Motion To Dismiss for Lack of Personal Jurisdiction.

Under settled federal procedure, in order to assert in personam jurisdiction over a nonresident defendant, the plaintiff simply needs to make a prima facie showing that the required elements of jurisdiction are present.[6] In this

---

[3] In *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), the Court noted that district court judges have the power to enter summary judgment sua sponte "so long as the losing party was on notice that she had to come forward with all of her evidence." *Id.* at 326.

[4] The issues at bar have always been treated under 12(b)(2). While Fed. R. Civ. P. 12(b) provides for the "transformation" of a 12(b)(6) motion into one for summary judgment, there is no similar provision for 12(b)(2) motions, which would support the federal common law principle that less is required of a party seeking to establish jurisdiction as opposed to substantive issues.

[5] E.g., the Ninth Circuit in *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977), held that the plaintiff need only make a prima facie showing of the elements of piercing the corporate veil and that forcing any greater burden on plaintiffs, such as a preponderance of the evidence, would be unfair. *Accord Central Communications, Inc.* v. *City of Jefferson City, Mo.*, 589 F. Supp. 85 (W.D. Mo. 1984).

[6] See *Nelson* v. *R. Greenspan & Co., Inc.*, 613 F. Supp. 342, 345 (E.D. Mo. 1985); *Sun World Lines, Ltd.* v. *March Shipping Corp.*,

regard, the plaintiff's burden is said to be minimal or slight.[7] In this case, petitioner presented prima facie evidence of the elements of piercing the corporate veil under Missouri law.[8]

Under the Missouri Long Arm Statute, personal jurisdiction can be asserted over a nonresident defendant as a result of the commission of a tortious act within this state. Mo. Rev. Stat. § 506.500(3) (Supp. 1984). In addition, jurisdiction may be asserted if due process requirements are met, i.e., if the defendants have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). In determining jurisdiction, the Missouri Supreme Court has held that, at this stage of the proceedings, the plaintiff's bur-

---

585 F. Supp. 580, 582 (E.D. Mo. 1984). *Breiner Equipment Co.* v. *Dynaquip, Inc.*, 539 F. Supp. 204, 205 (E.D. Mo. 1982); *Barclays Leasing, Inc.* v. *National Business Systems, Inc.*, 750 F. Supp. 184, 186 (W.D. N.C. 1990); *Behagen* v. *Amateur Basketball Assoc. of United States of America*, 744 F.2d 731 (10th Cir. 1984); *Daval Steel Products* v. *M.V. Juraj Dalmatinac*, 718 F. Supp. 159 (S.D.N.Y. 1989); *Newport Components, Inc.* v. *NEC Home Electronics (USA), Inc.*, 671 F. Supp. 1525 (C.D. Cal. 1987); *Stephenson* v. *Barringer*, 758 F. Supp. 657 (D. Kan. 1991); *Flynt Distributing Co., Inc.* v. *Harvey*, 734 F.2d 1389, 1392 (9th Cir. 1984); *Aaron Ferer & Sons Co.* v. *Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977); *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977); *Strong* v. *RG Industries*, 691 F. Supp. 1017, 1018 (S.D. Miss. 1988); 4 C. Wright & A. Miller, *Federal Practice & Procedure* § 1068 at 250 (1990).

[7] E.g., *Central Investment Corp.* v. *Mutual Leasing Assoc., Inc.*, 523 F. Supp. 74, 77 (S.D. Ohio 1981); *Welsh* v. *Gibbs*, 631 F.2d 436 (6th Cir. 1980).

[8] It should be noted that other courts have simply applied a minimum contacts analysis to affiliated non-resident corporations. The relationship itself is a minimum contact which may support long arm jurisdiction. Further, if the relationship is one of control (as in the case of Telecom), jurisdiction is proper. *Hoffman* v. *United Telecommunications, Inc.*, 575 F. Supp. 1463, 1472-76 (D. Kan. 1983).

den is limited to making a prima facie showing that acts contemplated by the statutes took place. "Certainly a trial on the merits is not required, which, among others, might include questions of negligence, contributory negligence, contributory fault, causation and the extent of damages . . ." *State ex rel. Deere & Co.* v. *Pinnell*, 454 S.W.2d 889, 893 (Mo. banc 1970).

Where the trial court uses only pleadings, discovery materials and an affidavit to determine whether personal jurisdiction exists, all disputes about jurisdictional facts, including issues of corporate relationship, should be resolved in favor of the plaintiff even though he will have to establish those facts *later* by a preponderance of the evidence.[9] The truth of undisputed allegations of plaintiff's complaint will be assumed. *Boddie* v. *Connecticut*, 401 U.S. 371, 373 (1971).

It has also been held that less proof is needed on jurisdictional issues than substantive ones at the pre-trial stage. See, e.g., *Mortensen* v. *First Federal Savings & Loan Assoc.*, 549 F.2d 884, 892 (3rd Cir. 1977), which also holds that it is not fair for a district court to evaluate jurisdictional evidence that unfairly precludes a fair trial on the merits of a case. When jurisdictional and liability issues are intertwined, the Third Circuit has held that "we feel that it is incumbent upon the trial judge to demand *less* in the way of jurisdictional proof than would be appropriate at a trial stage." *Id.* (emphasis added). Instead of resolving doubts in favor of jurisdiction, the *Radaszewski* courts made it contingent on the merits.

When the determination of a jurisdictional issue depends upon a ruling on the merits, however, the lower court should proceed to a trial on the merits and the jurisdictional issue should therefore await such a determination. It is far preferable that the determination be made at trial where the plaintiff can present his case in

---

[9] *Tax Lease Underwriters, Inc.* v. *Blackwall Green Ltd.*, 613 F. Supp. 1082 (E.D. Mo. 1985); *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977); *Myers* v. *Johns Manville Sales Corp.*, 600 F. Supp. 977 (D. Nev. 1984).

a coherent orderly fashion without any risk of prejudice with respect to his case on the merits. See *Data Disc, Inc.* v. *Systems Technology Assoc., Inc., supra*, at 1285-86; *Tax Lease Underwriters, Inc.* v. *Blackwall Green Ltd.*, 613 F. Supp. 1082, 1088 (E.D. Mo. 1985).[10] All doubts on jurisdictional points must be resolved in favor of plenary trial rather than dismissal at the pre-trial stage.[11]

Again, the lower courts did not rule that there were insufficient minimum contacts to sustain jurisdiction. Rather, the district court held that it was necessary to pierce the corporate veil before asserting jurisdiction over the parent company. Assuming the district court was correct in combining the substantive issues with the jurisdictional ones, Radaszewski was entitled to have the jurisdictional issues submitted to the jury.[12]

In *Bialek* v. *Racal-Milgo, Inc.*, 545 F. Supp. 25 (S.D. N.Y. 1982), the court noted that certain unrebutted allegations with respect to a parent corporation's control of its wholly-owned subsidiary established a prima facie case

---

[10] See also, *Myers* v. *Johns Manville Sales Corp.*, 600 F. Supp. 977, 981 (D. Nev. 1984); *Institutional Food Marketing Assoc., Ltd.* v. *Golden State Strawberries, Inc.*, 747 F.2d 448, 451 (8th Cir. 1984); *Block Industries* v. *DJH Industries, Inc.*, 495 F.2d 256, 259 (8th Cir. 1974).

[11] In *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363 (1966), a shareholder brought a derivative action against corporate officers who had allegedly defrauded the corporation. The Supreme Court held that "the basic purpose of the federal rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. . . If the rules of procedure work as they should in honest and fair judicial systems, they not only permit, but should as nearly as possible guarantee that bonafide complaints be carried to an adjudication on the merits." *Accord Miller* v. *Central Chinchilla Group, Inc.*, 494 F.2d 414, 417 (8th Cir. 1974).

[12] *Thornhill Publishing Co., Inc.* v. *General Telephone & Electronic Corp.*, 594 F.2d 730, 735 (9th Cir. 1979); *McBeath* v. *Inter-American Citizens for Decency Committee*, 374 F.2d 359, 361 (5th Cir. 1967); *Berardinelli* v. *Castle & Cooke, Inc.*, 587 F.2d 37, 38 (9th Cir. 1978).

so as to sustain jurisdiction. The case also noted that the defendant seeking a dismissal cannot prevail merely by rebutting such allegations in the context of a pre-trial motion such as Telecom has presented here. Unless the defendant's moving papers entirely refute plaintiff's allegations, the defendant can only gain such a dismissal at the close of proof at trial. *Id.* at 32. See also *Marine Midland Bank, N.A.* v. *Miller*, 664 F.2d 899, 904 (2d Cir. 1981).

Although the district court paid lip service to the concept of a plaintiff's prima facie obligation, it looked past the competent evidence presented by petitioner and proceeded to pick and choose between facts alleged by the parties, even though respondent did not present affidavits or other evidentiary proof. The court of appeals went even further and openly rejected black letter law regarding petitioner's prima facie burden. App. A at 11a-12a. By holding that the purchase of insurance completely negates the otherwise inadequate capitalization of Contrux, the court of appeals made specific factual determinations which were inappropriate for this stage of the proceedings. When the facts alleged in the plaintiff's complaint and supporting affidavits are controverted by defendant's affidavits, the conflict is resolved in the plaintiff's favor for purposes of establishing a prima facie case.[13] See also *Pocahontas First Corp.* v. *Venture Planning Group*, 572 F. Supp. 503, 505 (D. Nev. 1983). Therefore, even if Telecom had presented a conflicting affidavit from a qualified expert, the district court should have honored the veracity of plaintiff's initial affidavit. Here, defendants did not present any conflicting evidence and, therefore, dismissal was improper.

The often-cited case of *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977) illustrates the conflict between the Eighth Circuit (who re-

---

[13] *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d (S.D.N.Y. 1982); *Marine Midland Bank, N.A.* v. *Miller*, 664 F.2d 1280 (9th Cir. 1977); *Bialek* v. *Racal-Milgo, Inc.*, 545 F. Supp. 25 899 (2d Cir. 1981).

jected the prima facie standard as too confusing) and other circuits. *Data Disc* held that if the court determines it will receive only affidavits or affidavits plus discovery materials, these very limitations dictate that a plaintiff must make only a prima facie case showing jurisdictional facts in order to avoid defendant's motion to dismiss. *Id.* at 1285. Most importantly, the Ninth Circuit held that any greater burden, such as proof by a preponderance of the evidence, would permit a defendant to obtain a dismissal simply by controverting the facts established by plaintiff. *Id.* at n.2. Radaszewski has clearly established a prima facie case for jurisdiction purposes. Because the court was considering only one affidavit and some discovery materials, it is unfair to subject Radaszewski to any greater burden, especially when respondent presented *no* conflicting affidavits. At the very least, a full evidentiary hearing should be held where plaintiff can expand upon his proof surrounding the undercapitalization of Contrux.

Similarly, *Central Investment Corp.* v. *Mutual Leasing Assoc., Inc.*, 523 F. Supp. 74, (S.D. Ohio 1981), held that "while the burden of establishing jurisdiction is on the plaintiff, [citations omitted], where the district court determines to decide the issue solely on the basis of written materials, *that burden is relatively slight.* The plaintiff is only required to make a prima facie case of jurisdiction and the district court must consider the pleadings and affidavits in the light most favorable to plaintiff." *Id.* at 77. (emphasis added). Moreover, the burden placed on plaintiffs in establishing "alter ego" liability should be even lighter for tort victims than for those involved in contracts, because the latter benefits from arm's length dealing and voluntary choice.[14] Instead of having a "relatively slight" burden, Radaszewski faced a burden that was virtually insurmountable.

---

[14] Courts have been more willing to disregard corporate structure in tort, as opposed to contract cases. This difference in treatment can be attributed in major part to the element of choice inherent in a contractual relationship. Obviously, a tort victim has had no

Motions to dismiss should not be granted simply because a judge chooses not to believe the plaintiff's factual allegations. *Neitzke* v. *Williams*, 490 U.S. 319, 109 S. Ct. 1827, 1832 (1989). According to this Court, a claim cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.*[15]

It is not the function of a reviewing court to assess the merits of a particular claim when ruling on a motion to dismiss but, rather, to determine whether plaintiff may introduce evidence to support his claim. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). In *Data Disc. Inc.* v. *Systems Technology Assoc., Inc., supra*, piercing the corporate veil turned largely on conflicting views of the facts. The district court was presented with conflicting affidavits and chose to analyze those in granting the defendant's motion to dismiss for lack of personal jurisdic-

---

opportunity to negotitae with the defendant or to investigate the financial soundness of the tortfeasor. See Douglas and Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929); *Miles* v. *AT&T*, 703 F.2d 193 (5th Cir. 1983); *Texas Industries, Inc.* v. *Lucas*, 634 S.W.2d 748 (Tex. App. 1982); *Hanson Southwest Corp.* v. *Dal-Mac Construction Co.*, 554 S.W.2d 712 (Tex. App. 1977); *West* v. *Costen*, 558 F. Supp. 564 (W.D. Va. 1983). In *United States* v. *Golden Acres, Inc.*, 702 F. Supp. 1097 (D. Del. 1988) the government was not estopped from arguing undercapitalization of a corporation as a basis for piercing the corporate veil, even where the Department of Housing and Urban Development had repeated dealings with this corporation and knew it was undercapitalized. Interestingly, the district court in *Radaszewski* did allow Flexi-Van to pierce the corporate veil because it had the foresight to obtain Telecom's guarantee before leasing equipment to Contrux. App. B. Obviously, Konrad Radaszewski did not have this opportunity.

[15] *Accord Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980); *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969); *Southwest Investments I* v. *Midland Energy Co., Inc.*, 596 F. Supp. 219, 222 (E.D. Mo. 1984). See also *Thomas W. Garland, Inc.* v. *City of St. Louis*, 596 F.2d 784, 787 (8th Cir. 1979) (Complaint should not be dismissed merely because the court doubts that a plaintiff will prevail in the action.)

tion. The Ninth Circuit flatly rejected this approach, stating that "we do not see how it is possible for the district judge to 'weigh' the affidavits in order to resolve dispute issues. Except in those rare cases where the facts alleged in an affidavit are inherently incredible and can be so characterized solely by a reading of the affidavit, the district court has no basis for a determination of credibility. This is not one of those rare cases . . ." 557 F.2d at 1284. Importantly, the Ninth Circuit Court of Appeals also noted that if only one side of the conflict were to be supported by affidavit, "the task would be easy because we may not assume the truth of allegations in a pleading which are contradicted by affidavit".[16] Thus, *Data Disc* correctly held that where there are two conflicting affidavits, the benefit of the doubt must go against the granting of a motion to dismiss. Arguably, the Ninth Circuit, when presented with the facts at bar (i.e., where there is only *one* uncontested affidavit), would have made this appeal unnecessary.

Importantly, the Ninth Circuit focused on the appropriate burden of proof which should be placed upon the plaintiff at this stage. Noting that a prima facie showing is sufficient, the court discussed the fundamental unfairness of forcing the plaintiff to come forward with further proof on a motion to dismiss. *Id.* at 1285. As mentioned above, it is difficult to reconcile the minimal burden which a plaintiff has to bear in avoiding a motion to dismiss with the increasingly difficult standards needed to withstand a motion for summary judgment under *Anderson*.[17] At the very least, before a motion to dismiss can be treated by the court as a motion for summary judgment, all parties should be given a reasonable opportunity to present pertinent evidence. *Central Communi-*

---

[16] *Id.*, quoting *Taylor* v. *Portland Paramount Corp.*, 383 F.2d 624, 639 (9th Cir. 1967).

[17] 477 U.S. 242. See also *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986).

cations, Inc. v. *City of Jefferson City, Mo.*, 589 F. Supp. 85 (W.D. Mo. 1984).[18]

Due process requires that persons who are forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. U.S.C.A. Const. Amend. Fourteen; *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Under the Seventh amendment, claimants are entitled to a jury trial in all actions at common law where the value and controversy exceeds $20.00. See e.g., *Ross* v. *Bernhard*, 396 U.S. 531, 533 (1970). These constitutional guarantees are severely undercut when federal courts usurp the jury's function and prematurely grant dispositive motions.

In the case at bar, petitioner submitted competent evidence showing (1) control and dominance over the subsidiary; (2) undercapitalization of the subsidiary; and (3) the unjust result if the corporate veil is not pierced. These are all of the elements required by *Collet*. In addition to his well pleaded complaint, petitioner presented the affidavit of John Meara, a CPA whose qualifications have not been contested in any way by the respondent. In doing so, Radaszewski more than satisfied the "very minimal burden" required in order to avoid a motion to dismiss. It is obvious from the orders of the lower courts, however, that petitioner was subjected to a much different standard, even more stringent than a preponderance of the evidence.

The most disturbing aspect of the court of appeals' decision is its complete rejection of the standards applicable to a 12(b)(2) motion to dismiss. The Eighth Circuit expressly rejected the prima facie standard as "confusing" and incorrectly stated that "though the motion is captioned under Rule 12(b)(2) rather than under Rule 56, *the analytical process is the same as that used on a*

---

[18] See also *Bennett* v. *Berg*, 685 F.2d 1053, 1057-58 (8th Cir. 1982); *E.C. Alford* v. *National Post Office Mail Handlers*, 576 F. Supp. 278, 282 (E.D. Mo. 1983); *Kuhlmeier* v. *Hazelwood School District*, 578 F. Supp. 1286, 1291 (E.D. Mo. 1984).

motion for summary judgment." App. A at page 12a (emphasis added). There are three serious problems with this approach. First, this greatly increases the burden of proof placed on the tort plaintiff at the pretrial stage.[19] Second, it creates a conflict with those circuits which continue to follow traditional procedures regarding motions to dismiss.[20] Finally, the sua sponte transformation of a 12(b)(2) motion into a full blown motion for summary judgment under Rule 56 jeopardizes the tort plaintiff's right to due process and to trial by jury because it does not provide an adequate opportunity for the non-moving party to meet this heightened evidentiary burden.[21]

B. The Court of Appeals' Holding Cannot Be Reconciled With This Court's Guidelines Regarding Summary Judgment.

Even if it was appropriate for the court of appeals to sua sponte transform Telecom's motion to dismiss into one for summary judgment, the evidence proffered by petitioner was sufficient to defeat the motion because there are genuine issues of material fact. First, it should be noted that the Eighth Circuit opinion is predicated on its belief that the corporate subsidiary was not "improperly" undercapitalized [22] because the parent purchased liability insurance on its behalf. At the very least, the uncontested affidavit of petitioner's expert witness shows that this is a genuine issue of material fact. App. B at 21a. Further, the district court soundly rejected the "insurance defense" and agreed that plaintiff had shown undercapitalization on the part of the subsidiary, satisfy-

---

[19] Compare *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) with *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977).

[20] *Id.*

[21] *Anderson, supra*, 477 U.S. at 267, Brennan, J. dissenting.

[22] Importantly, the court of appeals stated that the subsidiary *was* undercapitalized "in the accounting sense". App. A at 7a. In talking about corporate financial structure, one might wonder what other sense there could possibly be. See Solomon article, *infra*.

ing the second *Collet* element.[23] If the sole basis of the Eighth Circuit opinion is its factual disagreement with a competent affidavit and the district court itself, surely there is a genuine issue of material fact which precludes the entering of a summary judgment.

In *Anderson* v. *Liberty Lobby*, *supra*, this Court held:

> The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not.

477 U.S. at 254.

Under this "reasonable juror" standard, Radaszewski clearly should prevail. The district court judge and Senior Circuit Judge Heaney found ample evidence that petitioner satisfied the second element of *Collet*. The two remaining Eighth Circuit justices, relying on Telecom's unsupported factual assertions, found otherwise. If federal judges can differ on the facts, surely this satisfies the *Anderson* standards for avoiding summary judgment.

Further, this Court has indicated that it continues to revere and protect the role of the jury:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Id. at 255, citing *Adickes* v. *S.H. Kress & Co.*, 398 U.S. at 158-159 (1970).

The nature of corporate inter-relationships is in and of itself an issue of material fact. Certainly, undercapitalization is always held to be an important issue, if not *the*

---

[23] The district court held that petitioner "made a prima facie showing that Contrux was undercapitalized from its inception. This showing has not been rebutted by Telecom's sole assertion that Contrux procured liability insurance . . ." App. B at 23a.

most important issue in determining whether to disregard a corporate entity.[24] Factual disputes as to whether the corporation was adequately capitalized are sufficent to raise a fact issue as to whether the management and operation of the parent and subsidiary are assimilated enough to disregard the corporate fiction.[25]

Here the Eighth Circuit held, as a matter of law, that the purchase of insurance (albeit through another subsidiary and from a poorly-rated, soon to be insolvent excess carrier) eliminated the undercapitalization element from the *Collet* equation. This analysis flies in the face of the approach taken by legal scholars and courts throughout the country. For example, *Atlas Comstruction Co.* v. *Slater*, 746 P.2d 352 (Wyo. 1987) noted that the existence of insurance might be a factor contributing to the issue of adequate capitalization, but there is no suggestion that insurance could be a substitute for this serious corporate obligation:

> Whatever the court's requirements in terms of inadequacy of assets, courts must still consider many varying factors relevant to their deliberations. For example, where the inadequacy of capital and other assets is at issue, the testimony of expert financial analysts and statisticians as to comparable businesses may be relevant. Perhaps this analysis might include evidence of the adequacy of insurance coverage and

---

[24] *Cummings* v. *HCA Health Services of Texas, Inc.*, 799 S.W.2d 403, 406 (Tex. App. 1990); Salomon, *Limited Limited Liability: A Definitive Judicial Standard for the Inadequate Capitalization Problem*, 47 Temple Law Quarterly 321 (1974).

[25] *West* v. *Costen*, 558 F. Supp. 564, 585 (W.D. Va. 1983); *DeWitt Truck Brokers* v. *W. Ray Flemming Fruit Co.*, 540 F.2d 681, 685 (4th Cir. 1976); *Atlas Construction Co.* v. *Slater*, 746 P.2d 352 (Wyo. 1987); *In re: IOTA Industries, Inc.*, 35 B.R. 603, 605 (S.D. N.Y. 1983); *Flynt Distributing Co., Inc.* v. *Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984); *Collet, supra*, 708 S.W.2d 273, 286 (Mo. App. 1986); *Consolidated Sun Ray, Inc.* v. *Oppenstein*, 335 F.2d 801, 808 (8th Cir. 1964).

involve testimony concerning the amounts of insurance carried by comparable businesses.[26]

Clearly, the *Atlas* court contemplated the analysis of insurance coverage as one factor to be determined in analyzing the issue of undercapitalization. Obviously, the insurance acquired by Telecom for Contrux was less than adequate. Otherwise, plaintiff would have an adequate remedy. In any case, it was improper for the court of appeals to come to its conclusion without hearing evidence on the "many varying factors relevant to their deliberations". *Id.*

Historically, summary judgment could not be granted unless the moving party could show that the facts and the law would preclude recovery by the plaintiff. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). It is impossible to reconcile this principle with the Eighth Circuit ruling in this case. The court of appeals' opinion cannot be upheld under this Court's standards would be if undercapitalization were the *only* factor to consider in deciding whether or not to pierce the corporate veil *and* if the purchase of *any* insurance (regardless of source or amount) would, as a matter of law, preclude any finding of undercapitalization. As shown below, such a finding would contradict virtually all Missouri and national case law on the subject.

The court of appeals held that because Telecom went through the motions of obtaining insurance, it was thereby relieved of its obligation to provide an adequate financial basis for its subsidiary. Instead of allowing this critical area to be sufficiently analyzed at trial, the court seemed to apply a sort of "good faith" standard, even though there was no testimony, live or otherwise, of any of the witnesses involved. Even if the "state of mind"[27] of a corporation was somehow relevant, this would clearly pre-

---

[26] *Id.* at 356, quoting Gelb, *Piercing the Corporate Veil—The Undercapitalization Factor*, 59 Chicago—Kent L. Rev. 1, at page 4, 14-15 (1982).

[27] App. A at 10a.

clude the entering of a summary judgment.[28] "It is only when the witnesses are subject to cross examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of even handed justice." *Hughes* v. *American Jawa, Ltd.*, 529 F.2d 21, 23 (8th Cir. 1976).

Undercapitalization is a factor that weighs heavily in favor of finding that the corporate form should be disregarded and the person in control of the corporation held responsible for acts undertaken in its name. *Eagle Transport, Ltd., Inc.* v. *O'Connor*, 470 F. Supp. 731, 733 (S.D. N.Y. 1979). The issues of undercapitalization and control are material and, where there is conflicting evidence as to whether an entity is undercapitalized, summary judgment is not appropriate. *Snyder* v. *United States*, 717 F.2d 1193 (8th Cir. 1983); *Sabine Towing & Transportation Co., Inc.* v. *Merit Ventures, Inc.*, 575 F. Supp. 1442 (E.D. Tex. 1983).

In the *Sabine* case, it was also noted that where a parent reaps a benefit by structuring the subsidiaries in a particular manner, including gaining tax benefits, as Telecom did in this case, there is an additional burden to adequately capitalize the business. *Id.* at 1446. If that burden is not met, the corporation should be held primarily liable for the subsidiary's debts in order to avoid injustice to innocent third parties.

There does not appear to be any authority which would support the court of appeals' holding that the purchase of insurance, of any type or in any amount, eliminates a parent corporation's obligation to adequate capitalize its subsidiary.[29] Under the cases cited above, the most that

---

[28] It has been held that summary judgment should be used sparingly when the case sounds in tort, particularly where motive and intent are at issue. See, e.g., *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

[29] Exhaustive research has revealed only one other reported case where the defendant tried to avoid the obligations of its undercapitalized subsidiary by stating that it had procured a liability

can be said is that the issue of insurance might be one factor to take into consideration when analyzing the many factors which determine adequate capitalization. At best, the existence of insurance creates a genuine issue of material fact [30] which, even if taken in a light favorable to *respondent*, would preclude summary judgment. Incorrectly, the court of appeals held:

> We are convinced that this record raises no such issue. Insurance is unquestionably relevant on the issue of "undercapitalization". The existence of insurance goes directly to the question of the subsidiary's financial responsibility . . . we see nothing sinister in the fact that the insurance was purchased through an agency wholly owned by Telecom.

Appendix A at page 12.

This holding demonstrates a complete miscomprehension, both of the standards appropriate for a motion to dismiss and the standards appropriate for a motion for summary judgment. Insurance was noted by the court of appeals to be *relevant* on the *question* of undercapitali-

insurance policy on behalf of the subsidiary. In *Auglaize Boxboard Co.* v. *Henton*, 126 N.E. 881, 883 (Ohio 1919), the fact that the parent corporation purchased liability insurance for its subsidiary did not enable the parent to escape liability where there was clear evidence of corporate control of the subsidiary. This case was also discussed in the Douglas and Shanks article, *infra*, at 201.

[30] The court of appeals' naive statement that insurance is somehow superior to a positive cash balance (App. A at 9a) ignores the diversity of insurance coverage both as to quantity and quality. There is a growing amount of litigation addressing the issue as to whether insurance agents and brokers can be held to professional standards of conduct and, if so, what level of duty is owed to an insured to obtain coverage that is reasonable and prudent under the circumstances. In cases where agents have been held liable to an insured for insurer insolvency, the placing of insurance is analyzed thoroughly, including an agent's duty to analyze the solvency of any reinsurers. See e.g., *Williams -Berryman, Ins. Co., Inc.* v. *Morphis*, 461 S.W.2d 577, 580 (Ark. 1971). In short, not all insurance is created equal. The complex analysis which is attendant to this type of litigation should not be ignored by the trier of fact when assessing the strength of a corporation's capital structure.

zation. The word "relevant" indicates that insurance is not absolutely conclusive, and therefore, there is a genuine issue of material fact which precludes summary judgment. The second prong of the *Collet* test does not require improper motivation. Even if it did, the court of appeals' lengthy discussion over inadequate premiums clearly shows why these factual issues need to be reserved for the trier of fact. App. A at 9a-13a. Here, the court of appeals gave a selective reading to the facts, without giving the petitioner the benefit of any doubt, dismissing the case with prejudice by reducing petitioner's probative evidence to mere "errors in business judgment". App. A at 13a.

Liability insurance, and the adequacy thereof, is clearly a factor to be explored by the finder of fact at trial. It is not appropriate for the district court or the court of appeals to disregard Missouri law on the effect of undercapitalization and to adopt the respondent's line of defense on the insurance issue, particularly when questions abound as to the adequacy of such insurance.

II. THE COURT OF APPEALS PLAINLY IGNORED CONTROLLING STATE LAW, CAUSING A DANGEROUS DEPARTURE FROM NATIONALLY ACCEPTED LEGAL PRINCIPLES AND WEAKENING THE PUBLIC'S PROTECTION FROM INSOLVENT CORPORATIONS.

The court of appeals' holding clearly contradicts Missouri substantive law. Missouri courts will disregard the existence of a corporate entity which is operated while undercapitalized. *Collet* v. *American National Stores, Inc.*, 708 S.W.2d 273, 286-287 (Mo. App. 1986). When the lack of appropriate capital causes an unjust loss, such as the inability to satisfy a creditor or a judgment plaintiff, the causation prong of the test is satisfied. *Id.*; *Grote Meat Co.* v. *Goldenberg*, 735 S.W.2d 379, 387 (Mo. App. 1987); *Accord H.H. Robertson Co.* v. *DiCarlo General Contractors, Inc.*, 789 F. Supp. 998, 1006 (E.D. Mo. 1992). This test is an objective one and does not hinge on a finding of improper intent.

Federal cases construing Missouri law have continued to follow the *Collet* test and have allowed the corporate veil to be pierced when one corporation exercises dominion and control over another and an injustice has been the result. In *H. H. Robertson Co.* v. *V. S. DiCarlo General Contractors, Inc., supra,* where the defendant was undercapitalized and unable to meet its financial obligations, the court held that plaintiff therefore met the second and third requirements for piercing the corporate veil. *Id.* Further, the requisite injustice was found where the record indicated that the plaintiff had no adequate legal remedy available to it as a result of the undercapitalization. Similarly, *Omaha Indemnity Co.* v. *Royal American Managers, Inc.*, 755 F. Supp. 1451 (W.D. Mo. 1991), held corporate officers and shareholders personally liable for the tortious conduct of their corporation, under the alter ego or instrumentality theory, where the corporation was undercapitalized. In fact, the *Omaha Indemnity* court found that the undercapitalization itself "is a misuse of the corporate form that will justify disregarding the legal fiction of a separate corporate existence". *Id.* at 1458, citing *Collet* at 286-87.[31]

Consequently, the Eighth Circuit's decision in this case presents an affront to the concept of federalism. Under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), federal courts must follow state substantive law in tort cases. The controlling Missouri case law holds that undercapitalization which results in unjust loss is sufficient to pierce the corporate veil when the parent dominates its subsidiary.[32] The court of appeals' express refusal to follow state law should, alone, provide grounds for review by this Court. See, e.g., *Six Companies* v. *Highway Dis-*

---

[31] See also *Grote Meat Co., supra,* 735 S.W.2d at 387.

[32] *Collet* v. *American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986); *Grote Meat Co.* v. *Goldenberg*, 735 S.W.2d 379 (Mo. App. 1987); *May Dept. Stores* v. *Union Electric Light & Power Co.*, 107 S.W. 2d 41 (1937). See also *Swall* v. *Custom Automotive Services, Inc.*, 831 S.W.2d 237, 240 (Mo. App. 1992).

trict, 311 U.S. 180 (1940); *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464 (1940).

Unlike the courts of Missouri, the court of appeals discounts the importance of undercapitalization and gives this concept weight only insofar as it might indicate *another* improper purpose or fraudulent act. Appendix A at 6a-7a. The second element of *Collet*, however, is written in the disjunctive and it is satisfied if "the control of the subsidiary is used to commit fraud *or* wrong, to perpetrate the violation of a statutory *or* other positive legal duty, *or* dishonest and unjust act in contravention of plaintiff's legal rights". *Collet* at 284. Missouri courts have made it clear that undercapitalization is more than sufficient to show the violation of a corporation's positive legal duty to adequately finance its offspring. Although the court of appeals acknowledged that this approach was uniformly followed by the Missouri courts, it expressly chose to disregard undercapitalization as a proper basis for meeting the second element of *Collet*:

> The reason, we think, is not because undercapitalization, in and of itself, is unlawful (though it may be for some purposes) but rather because the creation of an undercapitalized subsidiary justifies an inference that the parent is either deliberately or recklessly creating a business that will not be able to pay its bills or satisfy judgments against it.

App. A at 6a. Missouri law, however, is consistent with the overwhelming weight of authority which holds that undercapitalization is in and of itself a form of inequitable conduct. The *Collet* court, in discussing the second prong of the test, stated that:

> The control exercised by that corporation must have been used in an improper manner . . . Examples of such wrongs as would satisfy this standard include actual torts, violations of statutory duties, *undercapitalization*, *or* the stripping of assets from the subservient corporation.

Id. at 286 (emphasis supplied, citations omitted). It is not necessary to show that the dominant corporation or

shareholder intended any harm. It is only necessary to show that harm or injustice resulted from the insolvency. The standard requires an objective rather than a subjective test.[33]

The "improper motive" issue should be put to rest by the Supreme Court's holding in the case of *Anderson* v. *Abbott*, 321 U.S. 349 (1944). In that case, the shareholders of a bank stock holding company were held liable for assessments on an insolvent bank even though the holding company they created was organized in good faith, without fraudulent intent and the shareholders had no specific intention of avoiding liability.

> [T]here are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied . . . the cases of fraud make up part of that exception (citations omitted) But they do not exhaust it. An obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability. (citations omitted) That rule has been invoked even in absence of a legislative policy which undercapitalization would defeat.

Id. at 362.

There are many benefits which accompany the creation of the corporate structure, including limited liability. However, when a parent corporation dominates the actions and policies of its subsidiary, it must bear the burden of adequately financing that subsidiary. Speculation as to the *why* Contrux's incorporators kept it insolvent is fruitless. A subsidiary is either undercapitalized or it is not. If it *is*, and the subsidiary is a mere conduit of the parent, the veil will be pierced.

---

[33] *In re: Mobile Steel Co.*, 563 F.2d 692, 703 (5th Cir. 1977); *Eastridge Development Co.* v. *Halpert Assoc., Inc.*, 853 F.2d 772, 779-780 (10th Cir. 1988); *In re: Fabricators, Inc.*, 926 F.2d 1458, 1467 (5th Cir. 1991).

The facts presented by petitioner, even at this undeveloped pleading stage, clearly support a showing of undercapitalization and the court of appeals admitted as much:

> Most of the money contributed to its operation by Telecom was in the form of loans, not equity, and when Contrux first went into business, Telecom did not pay for all of the stock that was issued to it. This is a classic instance of watered stock, of putting a corporation into business without sufficient equity investment. Telecom in effect concedes that Contrux's balance sheet was anemic, and that, from the point of view of generally accepted accounting principles, Contrux was inadequately capitalized.

App. A at page 7a.

At least one author has advocated the use of undercapitalization as an independent basis for liability, i.e. if the subsidiary is undercapitalized, the loss should fall on the parent, not an innocent third party.

> The argument for inadequate capitalization as an independent factor for shareholder liability is strongest when viewed with respect to the tort claimant. He stands as an innocent party, injured by the insolvent corporation with whom he has come in contact, unable to recover a claim involuntarily incurred. Unlike the contract creditor, he neither consented to nor assumed the risk of insolvency or inadequacy of capital. Yet the corporation is permitted to avoid *any and all* costs of such incident where the amount exceeds the corporate capital. The inherent unfairness . . . is readily apparent.[34]

Although the power to pierce the corporate veil is to be exercised cautiously, the entity should be disregarded if there is undercapitalization and limiting the corporation's liability would create injustice or fundamental unfairness. *DeWitt Truck Brokers* v. *W. Ray Flemming Fruit Co.*, 540 F.2d 681, 685 (4th Cir. 1976). Following the

---

[34] Salomon, *Limited Limited Liability: A Definitive Judicial Standard for the Inadequate Capitalization Problem*, 47 Temple L.Q. 321 (1974).

principles set forth in *Anderson* v. *Abbott*, *supra*, the *DeWitt* court noted that a finding of fraud is *not a prerequisite* to piercing the corporate veil, especially when there is undercapitalization or domination of the corporate entity under scrutiny.[35]

In the case of *Bucyrus-Erie Co.* v. *General Products Corp.*, 643 F.2d 413 (6th Cir. 1981) the court utilized the same test as *Collet* in piercing the corporate veil. It flatly rejected the suggestion that fraudulent intent is required in order to find "alter ego" liability. *Id.* at 418. The court did find, however, that "[u]ndercapitalization is generally regarded an important factor in applying the alter ego doctrine, and sound policy considerations support a requirement for adequate financing as a prerequisite to the limited liability privilege afforded those who do business in a corporate form." *Id.* Thus, there appears to be a conflict in the circuits as to how the very same test is to be interpreted. The Sixth Circuit approach matches that of the Missouri courts and clearly is the correct one, holding that undercapitalization in an objective sense is sufficient to satisfy the second prong of the test and that fraudulent intent or improper purpose has no place in this analysis.[36]

The court of appeals' ruling weakens the laws protection of the public against insolvent tortfeasors. Undercapitalization is a ground for piercing the corporate veil because it is "the policy of the law that shareholders

---

[35] *Id.* at 684; See also, *Kirvo Industrial Supply Co.* v. *National Distillery & Chemical Corp.*, 483 F.2d 1098, 1106-7 (5th Cir. 1973); *National Marine Service, Inc.* v. *C. J. Thibodeaux & Co.*, 501 F.2d 940, 942 (5th Cir. 1974). *Accord Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R. Co.*, 417 U.S. 703 (1974). (Corporate form may be disregarded in the interest of justice where it is used to defeat an overriding public policy. Certainly public policy embraces the notion that parent corporations cannot escape liability without adequately financing their subsidiaries.)

[36] See also *Northern Illinois Gas Co.* v. *Total Energy Leasing Corp.*, 502 F. Supp. 412 (E.D. Ill. 1980); *United States* v. *Healthwin-Midtown Convalescent Hospital & Rehabilitation Center, Inc.*, 511 F. Supp. 416 (C.D. Cal. 1981).

should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities."[37] The corporate veil is often pierced in cases where the insolvency of the subsidiary results in a manifest injustice, including the insufficient recovery to an unsuspecting tort plaintiff.[38]

It has often been held that the separate identity of two corporations should be disregarded where one becomes the conduit of another. See e.g., *Talen's Landing, Inc.* v. *M/V Venture, II*, 656 F.2d 1157 (5th Cir. 1981). Here, Telecom wanted to continue its business of providing truck transportation throughout several states, including Missouri, and did not want to be encumbered by the union problems that Red Ball Spector was experiencing. Evidence of tax benefits also was presented. While it may have been legal for Telecom to set up a new subsidiary to circumvent these labor matters, it is clear that Contrux was a conduit or instrumentality set up so that this line of business could be continued:

> In every respect on the basis of the record now before us, Contrux was nothing but a shell corporation established by Telecom to permit it to operate as a non-union carrier without regard to the consequences that might occur to those who did business with Contrux or those who might be affected by its actions.[39]

The benefits of incorporation must be accompanied by the parent's willingness to adequately capitalize the new entity. Under Missouri law, undercapitalization is sufficient to support the second element of *Collet*.[40] It does not require a subjective finding of evil motive. The

---

[37] *Ballentine on Corporations*, 302-303 (1946 Ed.).

[38] *West* v. *Costen*, 558 F. Supp. 564, 587 (W.D. Va. 1983); *H.H. Robertson Co.* v. *DiCarlo General Contractors, Inc.*, 789 F. Supp. 998, 1000 (E.D. Mo. 1992); *Kramer* v. *Keyes*, 643 F.2d 382, 385 (5th Cir. 1981); *George W. Bennett Bryson & Co., Ltd.* v. *Norton Lilly & Co., Inc.*, 498 F.2d 328, 329 (5th Cir. 1974).

[39] Senior Circuit Judge Heaney, dissenting. App. A at 16a.

[40] Sinclair, *Systematizing Piercing the Corporate Veil*, Oct./Nov. 1988 Mo. Bar J. 423 (1988); *Swall, supra*, 831 S.W.2d at 240.

Eighth Circuit thus violated the *Erie* doctrine [41] and the public policy designed to protect victims of insolvent corporations. Arguably, this protection becomes even more important in these economically undisciplined times, where businesses, individuals, and governments seem reluctant to accept the financial consequences of their actions.

CONCLUSION

The Eighth Circuit Court of Appeals' decision to affirm the dismissal of this case is based solely on its rejection of the district court's firm holding that Contrux was indeed undercapitalized and that such undercapitalization was sufficient to meet the second element of the *Collet* test. The decision reflects (1) confusion regarding the level of proof necessary at this stage of the proceedings; and (2) refusal to apply Missouri law regarding the undercapitalization of a subsidiary corporation which is clearly dominated by its parent.

The three *Collet* elements [42]—commonly known as control, improper purpose, and proximate cause—are clearly satisfied in this case. All of the courts below have held that the first element, control, was established. The "improper purpose" prong is not limited to intentional or reckless acts and, in fact, the Missouri courts have clearly held that where a corporation is undercapitalized, the second prong of *Collet* is fully satisfied. See *Collet* at 287.

---

[41] *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

[42] It should also be noted that the most recent case on this issue applies a two pronged test. In *Swall* v. *Custom Automotive Services, Inc.*, 831 S.W.2d 237, 240 (Mo. App. 1992), the court held that the president and vice-president of a corporation were personally liable for a corporate debt where (1) they dominated and controlled the corporation and (2) the corporation was undercapitalized. It could be argued that the three prong test and the two prong test are basically indistinguishable. Both require domination by the shareholder and the use of such control to perpetrate an injustice. See *Swall supra* and *Terre du Lac Association, Inc.* v. *Terre du Lac, Inc.*, 737 S.W.2d 206, 218 (Mo. App. 1987). The third prong of the *Collet* test is essentially one of causation. Obviously, a plaintiff would not have standing if the control and undercapitalization did not result in some kind of loss, liquidated or otherwise.

Under Missouri law, the inability to repay a debt or satisfy a judgment is the type of injury that can satisfy the third prong. There can be no question that petitioner fulfilled his prima facie obligation. The subjective intent element employed by the Court of Appeals for the Eighth Circuit is not supported in any way by Missouri law and, in fact, negates the holdings of *Collet* and its progeny. Further, it creates a direct conflict between circuits, especially the Sixth,[43] Seventh,[44] Fifth,[45] Ninth [46] and Tenth[47] Circuits which utilize essentially the same test in deciding whether or not to pierce the corporate veil. See also *Anderson* v. *Abbott*, *supra*.

Although there is disagreement within the Court, and certainly some confusion within the circuits, as to the effect of *Anderson* v. *Liberty Lobby*, when competent evidence is proffered by the plaintiff which is in conflict with the defendant's pleadings, the lower courts should resolve all factual disputes in favor of the plaintiff and allow issues of material fact to be fully developed at trial. This is the only way that a legitimate claimant's right to trial by jury can be enforced. The administrative and social benefits which flow from the summary judgment concept are admittedly important in federal and state litigation. However, the burden on the plaintiff should not be so high that a district court or court of appeals is free to disregard plaintiff's competent (and uncontroverted) evidence and resolve genuine issues of material fact at the pretrial stage. If *Anderson* is to remain viable, it cannot be extended to "transformed" cases. Here, the respondent controlled its subsidiary. That control resulted in misuse

---

[43] *Bucyrus-Erie Co.* v. *General Products Corp.*, 643 F.2d 413 (6th Cir. 1981).

[44] *Steven* v. *Roscoe Turner Aeronautical Corp.*, 324 F.2d 157 (7th Cir. 1963).

[45] *Talen's Landing, Inc.* v. *M/V Venture II*, 656 F.2d 1157 (5th Cir. 1981).

[46] *Data Disc, Inc.* v. *Systems Technology Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977).

[47] *Eastridge Development Co.* v. *Halpert Assoc., Inc.*, 853 F.2d 772 (10th Cir. 1988).

of the corporate structure as shown by its undercapitalization. The petitioner is permanently brain damaged and may be without any remedy because of the insolvency of the subsidiary. Therefore, a clear injustice will result if the corporate structure is given undue credence.

Here the court of appeals chose to disbelieve petitioner's probative evidence in favor of respondent's lines of defense. This violates the rulings of this Court even if a motion for summary judgment were properly presented to the court and adequate notice given to the plaintiff. By rejecting substantive Missouri law on the legal effect of undercapitalization, the *Erie* doctrine was violated. Not only was petitioner subjected to an unforeseeable level of scrutiny; he was confronted with an unforeseeable departure from settled Missouri law.

This Court's supervisory powers should be employed to provide guidance to the circuits as what constitutes a prima facie case when in personam jurisdiction is challenged. Also, because the Federal Rules of Civil Procedure do not contemplate the transforming of a 12(b)(2) motion into a Rule 56 motion, the courts need to understand if and when that transformation is proper and, more important, how a plaintiff's constitutional rights can be safeguarded when his burden changes from being "minimal or slight" to proving by a preponderance of the evidence that a reasonable jury could find in his favor.[48]

Respectfully submitted,

MAX W. FOUST
JAMES P. FRICKLETON *
JULIE C. FRICKLETON
BART L. STROTHER
1100 Maine Street, Suite 2300
Kansas City, Missouri 64105
(816) 474-6050
Counsel for Petitioner

* Counsel of Record

March 12, 1993

[48] *Anderson, supra*, 477 U.S. at 257.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 91-1342WM, 91-1343WM

No. 91-1342WM

KONRAD RADASZEWSKI, by CECELIA RADASZEWSKI,
his duly appointed guardian of the
person and estate,

Appellant,

v.

TELECOM CORPORATION,

Appellee,

and FLEXI-VAN LEASING, INC.

No. 91-1343WM

KONRAD RADASZEWSKI, by CECELIA RADASZEWSKI,
his duly appointed guardian of the
person and estate,

Appellee,

v.

TELECOM CORPORATION,

Appellant,

and FLEXI-VAN LEASING, INC.

On Appeal from the United States District Court
for the Western District of Missouri

Submitted: June 11, 1992

Filed: November 12, 1992

Before RICHARD S. ARNOLD, Chief Judge, HEANEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

RICHARD S. ARNOLD, Chief Judge.

This is an action for personal injuries filed on behalf of Konrad Radaszewski, who was seriously injured in an automobile accident on August 21, 1984. Radaszewski, who was on a motorcycle, was struck by a truck driven by an employee of Contrux, Inc. The question presented on this appeal is whether the District Court had jurisdiction over the person of Telecom Corporation, which is the corporate parent of Contrux. This question depends, in turn, on whether, under Missouri law, Radaszewski can "pierce the corporate veil," and hold Telecom liable for the conduct of its subsidiary, Contrux, and Contrux's driver. The District Court held that it lacked jurisdiction. We agree, though for different reasons.

I.

In general, someone injured by the conduct of a corporation or one of its employees can look only to the assets of the employee or of the employer corporation for recovery. The shareholders of the corporation, including, if there is one, its parent corporation, are not responsible. This is a conscious decision made by the law of every state to encourage business in the corporate form. Obviously the decision has its costs. Some injuries are going to go unredressed because of the insolvency of the

corporate defendant immediately involved, even when its shareholders have plenty of money. To the general rule, though, there are exceptions. There are instances in which an injured person may "pierce the corporate veil," that is, reach the assets of one or more of the shareholders of the corporation whose conduct has created liability. In the present case, the plaintiff seeks to hold Telecom Corporation liable for the conduct of an employee of its wholly owned subsidiary, Contrux, Inc.

Under Missouri law, a plaintiff in this position needs to show three things. The leading case is *Collet v. American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986). The Missouri Court of Appeals had this to say:

> A tripartite test has been developed for analysis of the question. To "pierce the corporate veil," one must show;
>
> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transactions attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 284.[1]

---

[1] In a submission made shortly after the oral argument under Fed. R. App. P. 28(j), plaintiff claims that only a two-part test

It is common ground among all parties that Telecom, as such, has had no contact with Missouri. If it is subject to jurisdiction over its person in Missouri courts, it is only because of the conduct of Contrux, its subsidiary. So the issue of jurisdiction over the person depends on whether the corporate veil of Contrux can be pierced to bring Telecom into the case. As it happens, this is also the question upon which Telecom's substantive liability depends. (We assume for present purposes that Contrux is liable—this has not yet been proved.) Telecom raised the issue by filing a motion to dismiss the complaint for lack of jurisdiction under Fed. R. Civ. P. 12(b)(2) and for failure to state a claim under 12(b)(6). The parties have treated the matter as one of jurisdiction, and so will we, but in fact the underlying issue is the same: is Telecom liable for what Contrux did? [2]

Initially, the District Court granted Telecom's motion to dismiss on the ground that the first element of the

---

must be met. He cites *Jack Swall v. Custom Automotive Services, Inc.*, No. W.D.44788 (Mo. App., W.D. April 28, 1992), in an attempt to prove that the third element quoted in text from *Collet*, the element of proximate cause, is no longer part of the law of Missouri. We doubt the validity of this claim. *Swall* does not cite *Collet*, and, under the facts of *Swall*, the element of proximate cause was clearly met. It is true that *Swall*, when setting out the "test" under Missouri law, mentions only the first two of the *Collet* elements, but we are inclined to think that this was done simply because only the first two of the elements were in issue in *Swall*. In any case, our decision on this appeal does not turn on the third element, so we need not pursue this line of analysis.

[2] The complaint named as a defendant, in addition to Telecom, Contrux, and Contrux's driver, Flexi-Van, Inc., the owner of the trailer that Contrux was leasing, and that was involved in the accident. In addition to moving to dismiss the complaint, Telecom also moved to dismiss a cross-claim filed against it by Flexi-Van. The District Court denied this motion, but this action is not before us on appeal. All claims by or against Flexi-Van, Inc., have been settled.

Collet formulation, control, had not been met. This ruling was certified for interlocutory appeal under 28 U.S.C. § 1292(b), and we reversed. *Radaszewski v. Contrux, Inc.*, 891 F.2d 672 (8th Cir. 1989). We held that, at least as a matter of pleading, Radaszewski had alleged sufficient facts to satisfy the requirement of control. We further held that the District Court had not allowed plaintiff enough time for discovery. The judgment dismissing the complaint was reversed, and the cause remanded for additional discovery and for reconsideration by the District Court of the motion to dismiss. On remand, we said, plaintiff would need

> to show that Telecom's control of Contrux and Contrux's undercapitalization [this term, as we shall see, is used as a sort of proxy for the second element of the *Collet* formulation—improper motive] proximately caused his injury in order for the district court to exercise personal jurisdiction over Telecom.

891 F.2d at 675.

The District Court has now permitted the additional discovery, and we have a full documentary record. It has also reconsidered the motion to dismiss, and has again granted it. As to the second element of the *Collet* test (improper or unjust use of the subsidiary), the District Court held that plaintiff had made a sufficient showing to survive a motion to dismiss. But as to the third element, proximate cause, the District Court ruled for the defendant. No injury has been caused to the plaintiff by Telecom's control and use of its subsidiary, the Court reasoned, because the plaintiff has not yet established that the subsidiary is liable to him for anything. Only if liability is established, and plaintiff then unsuccessfully attempts to collect from Contrux, would it appear that the parent's misuse of the corporate form, as, for example, by putting Contrux into business with insufficient capital, had done any harm to Radaszewski. On this

basis, the District Court dismissed the complaint of Radaszewski against Telecom for lack of jurisdiction over Telecom's person. The dismissal was without prejudice, presumably on the theory that, if Radaszewski should establish Contrux's liability to him, and if the judgment should be uncollectible, Radaszewski could then re-file against Telecom. This ruling, like the previous one, was certified for interlocutory appeal under 28 U.S.C. § 1292 (b). We granted leave to appeal, and the case is again before us.

II.

For convenience, we quote again the second element of the *Collet* formulation. In order to pierce the corporate veil, a plaintiff must show, among other things, that the defendant's control of a subsidiary has

> been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights . . . .

Collet, 708 S.W.2d at 284. To satisfy this second element, plaintiff cites no direct evidence of improper motivation or violation of law on Telecom's part. He argues, instead, that Contrux was undercapitalized.

Undercapitalizing a subsidiary, which we take to mean creating it and putting it in business without a reasonably sufficient supply of money, has become a sort of proxy under Missouri law for the second *Collet* element. On the prior appeal, for example, we said that "Missouri courts will disregard the existence of a corporate entity that is operated while undercapitalized." 891 F.2d at 674. *Accord, Grote Meat Co. v. Goldenberg*, 735 S.W.2d 379 (Mo. App. 1987); *Collet, supra*, 728 S.W.2d at 286-87. The reason, we think, is not because undercapitalization, in and of itself, is unlawful (though it may be for some purposes), but rather because the creation of an undercapitalized subsidiary justifies an inference that

the parent is either deliberately or recklessly creating a business that will not be able to pay its bills or satisfy judgments against it. This point has been made clear by the Supreme Court of Missouri. In *May Department Stores Co. v. Union Electric Light & Power Co.*, 341 Mo. 299, 327, 107 S.W.2d 41, 55 (1937), the Court found an improper purpose in a case where a corporation was "operating it without sufficient funds to meet obligations to those who must deal with it." Similarly, in *Consolidated Sun Ray, Inc. v. Oppenstein*, 335 F.2d 801 (8th Cir. 1964), we said:

> Making a corporation a supplemental part of an economic unit and operating it without sufficient funds to meet obligations to those who must deal with it would be circumstantial evidence tending to show either an improper purpose or reckless disregard of the rights of others.

Id. at 806-07.

Here, the District Court held, and we assume, that Contrux was undercapitalized in the accounting sense. Most of the money contributed to its operation by Telecom was in the form of loans, not equity, and, when Contrux first went into business, Telecom did not pay for all of the stock that was issued to it. This is a classic instance of watered stock, of putting a corporation into business without sufficient equity investment. Telecom in effect concedes that Contrux's balance sheet was anemic, and that, from the point of view of generally accepted accounting principles, Contrux was inadequately capitalized. Telecom says, however, that this doesn't matter, because Contrux had $11,000,000 worth of liability insurance available to pay judgments like the one that Radaszewski hopes to obtain. No one can say, therefore, the argument runs, that Telecom was improperly motivated in setting up Contrux, in the sense of either knowingly or recklessly establishing it without the ability to pay tort judgments.

In fact, Contrux did have $1,000,000 in basic liability coverage, plus $10,000,000 in excess coverage. This coverage was bound on March 1, 1984, about five and one-half months before the accident involving Radaszewski. Unhappily, Contrux's insurance carrier became insolvent two years after the accident and is now in receivership. (This record does not show the financial status of the receivership. We thus do not know whether any money would ever be available from the insurance company to pay a judgment in favor of Radaszewski, if he obtains one.) But this insurance, Telecom points out, was sufficient to satisfy federal financial-responsibility requirements. Under 49 C.F.R. § 387, motor carriers must maintain "financial reserves (e.g., insurance policies or surety bonds) sufficient to satisfy liability amounts set forth in this subpart covering public liability." 49 C.F.R. § 387.5. It is undisputed that the amount of insurance maintained by Contrux exceeded federal requirements, and that Contrux, at all times during its operations, was considered financially responsible by the relevant federal agency, the Interstate Commerce Commission.

The District Court rejected this argument. Undercapitalization is undercapitalization, it reasoned, regardless of insurance. The Court said:

> The federal regulation does not speak to what constitutes a properly capitalized motor carrier company. Rather, the regulation speaks to what constitutes an appropriate level of *financial responsibility.*

Konrad Radaszewski v. Contrux, Inc., No. 88-0445-CV-W-1 (W.D. Mo. Oct. 26, 1990), slip op. 7 n.6 (emphasis in original). This distinction escapes us. The whole purpose of asking whether a subsidiary is "properly capitalized," is precisely to determine its "financial responsibility." If the subsidiary is financially responsible, whether by means of insurance or otherwise, the policy

behind the second part of the *Collet* test is met. Insurance meets this policy just as well, perhaps even better, than a healthy balance sheet.

At the oral argument, counsel for Radaszewski described the insurance company in question as "fly-by-night." He pointed out, and this is in the record, that the insurance agency that placed the coverage, Dixie Insurance Agency, Inc., was, like Contrux, a wholly owned subsidiary of Telecom. (Apparently the $1,000,000 primary policy is still in force. It is only the $10,000,000 excess policy that is inoperative on account of the insolvency of the excess carrier, Integrity Insurance Co.) Plaintiff argues that if the case went to trial he could show that the excess carrier "was an insurance company with wobbly knees for years before its receivership." Reply Brief of Appellant 9. He also says that the excess carrier was not strong enough even to receive a minimum rating in the Best insurance guide. Finally, plaintiff suggests that Contrux bought "its insurance from a financially unsound company which most certainly charged a signficantly lower premium." Reply Brief of Appellant 10.

The dissent, *Post* at ——, raises certain questions about the adequacy of the insurance coverage purchased by Contrux. In our view, a careful reading of the record does not bear out the contentions made. In the first place, Contrux unquestionably had good basic coverage of $1,000,000 from the insurance company of the State of Pennsylvania, an insurer whose solvency is not questioned. III Joint App. 756. For this coverage Contrux apparently paid a premium of $17,000. No suggestion is made that this premium was not adequate. It is true that the excess carrier, Integrity Insurance Co. (not Integral), did not receive a Best's rating in 1985 and 1986. The relevance of this information is dubious at best. Importantly, the information was not available to Contrux when it purchased insurance from Integrity in

1983, or when it renewed the insurance in 1984. There is no evidence in the record as to whether a Best's rating was given in the 1984 publication. The accident in question happened in 1984. Events occurring thereafter are of tenuous relevance to Contrux's state of mind at the time of the purchase of the insurance. Recall that under *Collet* some evidence of improper motive is required to satisfy one of the elements necessary for piercing the corporate veil.

The dissent argues that Telecom, or Contrux, paid only a $4,000 premium for the entire coverage of $11,000,000. This overlooks the fact, recounted above, that a separate and far more substantial premium was paid for the $1,000,000 in basic coverage. As we read the available information, Contrux paid a premium of $4,900 for $10,000,000 in excess coverage for the year beginning March 1, 1983. III Joint App. 754. For the next year, the year in which the accident occurred, the same coverage costs $5,480. *Id.* at 755. There is no evidence in this record, by way of opinion testimony or otherwise, that these premiums are below the market level. It is true that Integrity incurred operating losses in 1983 and 1984, see III Joint App. 653, but the same page of the record reveals that Integrity's financial position improved almost twofold in the year 1984. Its surplus funds at the close of 1983 were $25,374,000. At the end of 1984, these funds reached $40,526,000. *Ibid.* Accordingly, we see no basis whatever for suspecting that Integrity was insolvent at the time the insurance was purchased. The company had been in business since 1958 and was licensed in the District of Columbia and all states. As of the end of 1985, there was still a policyholders' surplus of $20,514,000. *Id.* at 655. This information, in our view, supports at most an inference that Contrux may have made an error in business judgment in placing its excess coverage with Integrity. It furnishes no genuine support for an inference of improper purpose.

At this point it is appropriate to note the proper standard to apply in assessing factual claims in the present procedural status of this case. The District Court dismissed the complaint under Fed. R. Civ. P. 12(b)(2) for want of jurisdiction over the person of Telecom. In doing so, however, it did not rely solely on the pleadings. It had before it and relied also on other material, including affidavits and depositions. We have, therefore, in substance, what amounts to a motion for summary judgment on the issue of jurisdiction over the person. The question before the District Court, and before us on appeal, is simply whether Radaszewski has raised any genuine issue of fact material to the question of personal jurisdiction over Telecom. If he has not, there is no point in a trial, and if the case went to trial, with no more evidence than we presently have before us, the issue of personal jurisdiction over Telecom would never get to the jury: Telecom would be entitled to a directed verdict, on the ground that no rational trier of fact could find personal jurisdiction over it. Jurisdiction, to be sure, is a "question of law," in an abstract sense, but it often, as here, turns on questions of fact. What degree of control did Telecom exercise over Contrux? Was Contrux undercapitalized? Did Telecom's conduct with respect to Contrux proximately cause any injury to the plaintiff? Thus, as with every other question of fact, a court, when faced with a pre-trial motion for judgment as a matter of law, must ask itself whether there is any genuine issue. If there is not, the motion should be granted. If there is, the case should go forward and be tried. Both parties cite authorities to the effect that, before trial, a plaintiff need show only a "prima facie case" on jurisdiction. This somewhat confusing formulation means, we think, only that a complaint should not be dismissed for want of jurisdiction, before trial, if there is any genuine issue as to any fact material to the jurisdictional question.

Thus, in *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977), we said:

> While the facts adduced in a Rule 12(b)(2) Motion to Dismiss for lack of personal jurisdiction must be viewed in the light most favorable to the party opposing the motion, there must nonetheless be some evidence upon which a prima facie showing of jurisdiction may be found to exist, thereby casting the burden upon the moving party to demonstrate a lack of personal jurisdiction.

This is the same standard as the one we apply on motions for summary judgment under Rule 56. We look at the facts in the light most favorable to the party opposing the motion, give him the benefit of all reasonable inferences, and grant the motion only if there is no genuine issue as to any material fact, so that the moving party is entitled to judgment as a matter of law. So here, though the motion is captioned under Rule 12(b)(2) rather than under Rule 56, the analytical process is the same as that used on a motion for summary judgment. We look at the facts relevant to the issue of jurisdiction in the light most favorable to Radaszewski, give him the benefit of all reasonable inferences from these facts, and deny the motion to dismiss if the record, viewed in this way, raises any genuine issue of fact material to the issue of of jurisdiction.

We are convinced that this record raises no such issue. Insurance is unquestionably relevant on the issue of "undercapitalization." The existence of insurance goes directly to the question of the subsidiary's financial responsibility. If a parent has established a financially responsible subsidiary, then that subsidiary is not "undercapitalized" in the only sense that matters for present purposes. That subsidiary, in other words, is not unable to meet its obligations. It therefore cannot have been established by the parent, either deliberately or recklessly,

in an effort to avoid obligations or to make then difficult to collect. The improper-conduct or motivation portion of the *Collet* test cannot be met. Here, it is beyond dispute that Contrux had insurance, and that it was considered financially responsible under the applicable federal regulations. We see nothing sinister in the fact that the insurance was purchased through an agency wholly owned by Telecom. This is a common business practice. The assertion that a reduced premium was paid is wholly without supoprt in the record. It is based on speculation only. There is no evidence that Telecom or Contrux knew that the insurance company was going to become insolvent, and no reason, indeed, that we can think of why anyone would want to buy insurance from a company that he thought would become insolvent.

The insolvency, moreover, did not occur until about two years after the accident. The fact that the excess carrier did not have a rating in Best would be sufficient, we suppose, to call into question Contrux's business judgment in selecting the insurance company, but it is not sufficient to raise a *genuine* issue of improper motivation or intent to evade legal obligations. The doctrine of limited liability, after all, is intended precisely to protect a parent corporation whose subsidiary goes broke. That is the whole purpose of the doctrine, and those who have the right to decide such questions, that is, legislatures, believe that the doctrine, on the whole, is socially reasonable and useful. We think that the doctrine would largely be destroyed if a parent corporation could be held liable simply on the basis of errors in business judgment. Something more than that should be shown, and *Collet* requires something more than that. In our view, this record is devoid of facts to show that "something more."

III.

We hold that plaintiff has made no showing of any genuine issue of material fact with respect to the dishonesty or improper-conduct element of the *Collet* test.

In this respect, we disagree with the District Court. We agree, however, with the result reached by that Court. The complaint against Telecom must be dismissed for want of jurisdiction. Additionally, the dismissal should be with prejudice. Under the District Court's rationale, lack of a showing of proximate cause, the defect in personal jurisdiction could be cured later, if Radazewski obtained a judgment against Contrux. Thus, it was consistent for that Court to dismiss the complaint without prejudice. Failure to meet the improper-conduct element of *Collet*, however, is not curable. It does not depend on future events. Plaintiff has had a fair chance to show this element, and he has not succeeded. We therefore affirm the judgment of the District Court dismissing the complaint for want of jurisdiction, but modify that judgment to provide that it is with prejudice as to Radaszewski's complaint against Telecom.

HEANEY, Senior Circuit Judge, dissenting.

I respectfully dissent. The record is more than sufficient to support a prima facie showing that personal jurisdiction over Telecom exists.

Contrux is a wholly owned subsidiary of Telecom. It was organized as a nonunion subsidiary to take advantage of the lower wage and benefit package that such status would permit. It was initially capitalized for only $25,000, even though it was to operate as a nationwide motor carrier with equipment valued at $1,000,000 or more. Tractors and trailers were purchased for Contrux by Telecom. Telecom assumed ultimate responsibility for the payment of the purchase price. Moreover, Telecom periodically advanced money to Contrux for operating expenses or guaranteed payment for such expenses, taking as security for its advances a mortgage on all the tangible assets of Contrux. Contrux's debt to Telecom eventually totaled over $750,000, all of which was secured

in 1985 by a mortgage on all of Contrux's assets, leaving little or nothing for unsecured or judgment creditors.

Contrux had a negative net worth and net operating losses each of the four years that it was actively in business. Most important business decisions involving Contrux were made by Telecom because Contrux had neither the working capital nor the unencumbered assets to permit it to make decisions on its own. In every respect on the basis of the record now before us, Contrux was nothing but a shell corporation established by Telecom to permit it to operate as a nonunion carrier without regard to the consequences that might occur to those who did business with Contrux or those who might be affected by its actions.

Telecom does not challenge the above facts. Rather, it argued that because Contrux obtained $1,000,000 in liability insurance through Telecom, Contrux had sufficient funds to meet its obligations to tort claimants. The district judge rejected this contention, stating:

> Whether a corporation is undercapitalized is a question of fact which turns on the nature of the business of the corporation and the risks that business necessarily faces. . . .
>
> Upon review of all the pleadings and evidentiary materials, the court concludes that plaintiff and Flexi-Van have made a prima facie showing that Contrux was undercapitalized from its inception. This showing has not been rebutted by Telecom's sole assertion that Contrux procured liability insurance in conformity with federal regulation. Furthermore, Telecom has never directly disputed the specific allegations of undercapitalization that have been made by plaintiff and Flexi-Van. As for showing that Contrux was undercapitalized for an improper purpose, the court finds that the evidence submitted on this issue has failed to resolve this material factual

> dispute. Given that a determination of a corporation's financial status is a question of fact, the court finds that the question is best left for the trier of fact to resolve.

The majority rejects the district court's analysis, reasoning that Contrux had liability insurance and thus was considered financially responsible under the applicable federal regulations. In my view, Contrux's liability insurance is a relevant factor to be considered, but a fact finder after a trial might well find that this factor alone does not require a verdict for the defendant.

There are many unanswered questions about the $10,000,000 excess coverage policy purchased from the Integral Insurance Company. First, was Integral solvent at the time the insurance was purchased. The record reveals that Integral incurred large operating losses in 1983 and 1984, that it did not receive a Best rating in 1984 because a substantial portion of its business was reinsured with reinsurers not licensed by the United States, and that it did not receive a Best rating in 1985 because it could not meet minimum standards. The record further reveals that Telecom paid only $4,000 for the $11,000,000 policy procured through its own subsidiary insurance agency. It seems to me that these facts raise an issue as to whether Integral was solvent at the time of purchase and that the issue is one to be developed at trial. Second, what did Telecom know about Integral when it made the purchase. If it knew or reasonably should have known that it was insolvent or nearly so at the time the coverage was purchased, then the insurance did little or nothing to enhance the economic viability of Contrux.

The majority asks why anyone would want to buy insurance from an insolvent company. An answer readily comes to mind. The purchase was a cheap way of complying with federal regulations and furthered the illusion

to all concerned that Contrux was a viable company able to meet its responsibilities. The record does not show that the federal regulating agency determines whether an insurance company is capable of meeting the claims that may be valid against it. The regulation is apparently satisfied simply by filing proof of insurance. Surely Telecom could have determined Integral's ability to meet lawful claims if it had inquired. This issue could be fully developed at trial.

As the matter now stands, the innocent victim may have to bear most of the costs of his disabling injuries without having the opportunity to prove that Contrux was intentionally undercapitalized. I believe this is wrong and inconsistent with Missouri law. I would thus remand for trial.[1]

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

---

[1] Having reached this conclusion, I must deal with the district court's order to dismiss without prejudice because Radaszewski does not yet have a verdict against Contrux and is unable to collect his full damage. I do not believe that the district court's decision is consistent with Missouri law. In *Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 746 (Mo.App. 1980), the court said: "it is clear when the action of the dominant corporate renders the subservient corporation insolvent, then the requisite injury and causal connection is established." *Id.* at 287. I would add that it makes little sense to have two trials when all issues can be resolved in one.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 88-0445-CV-W-1

KONRAD RADASZEWSKI,
Plaintiff,

v.

CONTRUX, INC., *et al.*,
Defendants.

ORDER

[Filed Oct. 26, 1990]

Two motions are pending in this case. On April 20, 1990 defendant Telecom Corporation ("Telecom") filed a Motion to Dismiss Plaintiff's First Amended Complaint for lack of personal jurisdiction. On May 9, 1990 Telecom filed a Motion to Dismiss Cross-Claim of Defendant Flexi-Van Leasing, Inc. ("Flexi-Van"). In an Order entered August 27, 1990, this court deferred ruling on Telecom's motions so as to allow the parties to supplement their pleadings on the specific issue of whether "the fact that Contrux procured insurance, by itself, rebuts the allegation of undercapitalization." The parties have complied with this request.[1] For the reasons set forth below, Tele-

---

[1] For purposes of clarification, the court orally granted Telecom's request to file a reply to the supplemental briefs the parties were asked to file on September 17, 1990. Although Flexi-Van was not granted leave to file its Augmented Supplemental Suggestions, filed October 2, 1990, it was taken into consideration in ruling on Telecom's motions to dismiss.

com's Motion to Dismiss Plaintiff's First Amended Complaint will be granted and its Motion to Dismiss Cross-Claim of Defendant Flexi-Van Leasing, Inc. will be denied.

I. DISCUSSION

In seeking dismissal of plaintiff's suit and Flexi-Van's cross-claim, Telecom relies on Fed. R. Civ. Pro. 12(b)(2), lack of personal jurisdiction, and 12(b)(6), failure to state a claim upon which relief may be granted.[2] It is the plaintiff's (and in this case, Flexi-Van's) burden of proof to establish jurisdiction over Telecom. *Morris v. SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988). When a motion to dismiss for lack of personal jurisdiction is decided solely on the pleadings and other evidentiary materials submitted to the court, *the plaintiff need only make a prima facie showing* that personal jurisdiction exists. *Stephens v. Coleman*, 712 F. Supp. 1571, 1574 (N.D. Ga. 1989); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1351 (1990).

In response to Telecom's motions, plaintiff and Flexi-Van contend that personal jurisdiction over Telecom exists because defendant Contrux, Inc. ("Contrux") was merely the alter ego of Telecom. Before it can be found that one corporation is the alter ego of another corporation, the party making the allegation must successfully apply the three-prong analysis set out in *Collet v. American National Stores, Inc.*, 708 S.W.2d 273, 284 (Mo. Ct. App. 1986). Earlier, the Court of Appeals for the Eighth Circuit held that plaintiff successfully established the first element of the alter ego analysis—that Telecom exercised such control over Contrux that the two entities acted as one. *See* Slip Op. at 4-5. Two additional ele-

---

[2] In briefing its motions, Telecom has relied exclusively on the issue of personal jurisdcition in arguing for dismissal. As a consequence, the court's ruling hinges on the resolution of this issue alone.

ments, necessary to finding an alter ego relationship, remain to be decided. These elements are: 1) establishing that the control exercised by the parent over the subsidiary corporation was used to commit fraud wrong, a violation of a statutory or other legal duty, and 2) establishing that the control and breach of duty proximately caused the injury or unjust loss complained of. *Collet*, 708 S.W.2d at 284.

A. *Issue of Capitalization*

Plaintiff and Flexi-Van argue that the second element of the alter ego analysis is met because Telecom failed to adequately capitalize Contrux. In response, Telecom contends that its purchase of liability insurance in excess of the requirements set forth under the Minimum Levels of Financial Responsibility for Motor Carrier, 49 C.F.R. § 387 (1981), rebuts the allegation that Contrux was undercapitalized from its inception. Telecom goes on to say it would be "inconsistent" to find that Contrux was undercapitalized when it was "financially responsible," as defined by federal regulation. *See* Telecom's Supplemental Reply Brief at 2.

The parties are not in agreement on what it means for a corporation to be undercapitalized. In its supplemental brief, Flexi-Van acknowledges that "no court has undertaken to define, describe or characterize the terms "capitalization' or 'undercapitalization.'" *See* Supplemental Suggestions of Flexi-Van at 7. Flexi-Van goes on to suggest that the lack of a definition is due, in large part, to the fact that the words are "terms of art peculiar to the accounting profession." *Id.* Consistent with that explanation, both Flexi-Van and plaintiff[3] suggest that

[3] Plaintiff adopts and incorporates as its own Flexi-Van's argument that generally accepted accounting principles should be applied in analying Contrux's financial condition. *See* Further Suggestions in Opposition of Motion to Dismiss at 2.

ordinary accounting principles should be applied in determining whether Contrux was undercapitalized. In support thereof, they attach the affidavit of John M. Meara, a certified public accountant, who concluded upon review of Contrux's financial statements that the subsidiary "began its existence as an insolvent company and continued through its life as an insolvent company." *See* Affidavit of John W. Meara at 3.[4] Telecom does not directly attack Mr. Meara's affidavit.[5] Rather, Telecom avers that the reliance placed on the affidavit does not alter the fact that

> Contrux's purchase of liability insurance, far above minimum standards required by federal law, establishes that Telecom had no improper purpose or motive in its dealings with Contrux, particularly in regard to potential tort claimants such as plaintiff.

---

[4] In an earlier pleading plaintiff presents a detailed summary of the capitaliation of Contrux. The summary includes an overview of the subsidiary's initial capitalization, as well as the number and size of inter-company cash advances made by Telecom to Contrux—some of which were eventually written off as losses by Telecom. Plaintiff also alleges that Telecom routinely served as guarantor of contracts entered into by Contrux. Additionally, plaintiff alleges that right after Contrux's corporate charter was dissolved, Telecom converted its status as an unsecured creditor to one as a secured creditor. *See* Plaintiff's Suggestion in Opposition at 15-23.

[5] Telecom, in its reply to plaintiff's suggestions opposing the motion to dismiss, also declined to directly respond to plaintiff's allegations about Contrux being undercapitalized. Instead, Telecom states that plaintiff ignores "the fundamental rule that in ruling on a motion to dismiss this Court limits its review to an examination of the facts alleged in plaintiff's Complaint. . . . For this reason Telecom need not respond to the many misstatements in plaintiff's discussion of the 'evidence.'" *See* Telecom's Reply to Plaintiff's Suggestions in Opposition at 2. Telecom misstates the rule on what evidence a court may consider in ruling on a motion to dismiss for lack of personal jurisdiction. A court may consider affidavits and any other relevant material, as well as the pleadings, in resolving the jurisdiction issue. *See* 5A C. Wright & A. Miller, Federal Practice & Procedure § 1351 at 253 & n.31.

> Undercapitalization may be evidence of an improper purpose, but only in cases where it demonstrates an intent to defeat the claims of lawful creditors or others who must deal with a corporation.

See Telecom's Supplemental Reply Brief at 5.

Throughout the discussion of whether Contrux was adequately capitalized, Telecom has exclusively relied on the fact that Contrux obtained liability insurance in excess of the federal requirements for motor carriers of property. This fact alone, Telecom argues, rebuts any testimony to the effect that Contrux was undercapitalized from its inception. In so providing, Telecom looks to the language of *May v. Department Stores, Co. v. Union Electric Light & Power Co.*, 107 S.W.2d 41, 55 (Mo. 1937), which provides that where a corporation is operated "without sufficient funds *to meet obligations to those who must deal with it*[,] [that] would be circumstantial evidence tending to show either improper purpose or reckless disregard of the rights of others." (Emphasis added). Because Contrux had sufficient funds to meet its obligations to tort claimants (in the form of liability insurance), Telecom concludes that the corporation was not undercapitalized. Alternatively, Telecom asserts, even if one were to accept as true plaintiff's and Flexi-Van's allegations that Contrux was undercapitalized, the parties still fail under the second prong of the *Collet* test because the purchase of insurance would weigh against a finding that Telecom had an "improper purpose" or motive for undercapitalizing Contrux. *See* Telecom's Supplemental Reply Brief at 5.

Whether a corporation is undercapitalized is a question of fact which turns on the nature of the business of the corporation and the risks that business necessarily faces. 1 Fletcher Cyclopedia of the Law of Private Corporations § 44.1 (rev. 1990). In determining what factors may be taken into consideration, one state supreme court cited to

a law review discussion of undercapitalization as guidance:

> Whatever the courts' requirements in terms of inadequacy of assets, courts must still consider *many varying factors* relevant to their deliberations. . . . where the inadequacy of capital and other assets is at issue the testimony of expert financial analysts and statisticians as to comparable businesses maybe relevant. *Perhaps this analysis might include evidence of the adequacy of insurance coverage*, and involve testimony concerning the amounts of insurance carried by comparable businesses.

(Emphasis added). *Atlas Construction Co. v. Slater*, 746 P.2d 352, 358 (Wyo. 1989) (quoting Gelb, *Piercing the Corporate Veil—The Undercapitalization Factor*, 59 Chicago-Kent L. Rev. 4, 14-15 (1982)). It has also been said that an analysis of a corporation's financial condition should emphasize "economic viability rather than an inflexible computation of minimal capitalization." 1 Fletcher Cyclopedia of the Law of Private Corporations § 44.1 at 812. Thus, a corporation would be undercapitalized when "there is an obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking." *Id.*

Upon review of all the pleadings and evidentiary materials, the court concludes that plaintiff and Flexi-Van have made a prima facie showing that Contrux was undercapitalized from its inception. This showing has not been rebutted by Telecom's sole assertion that Contrux procured liability insurance in conformity with federal regulation.[6] Furthermore, Telecom has never di-

---

[6] Telecom's suggestion that Contrux was adequately capitalized because it "exceeded the motor carrier industry standard for financial responsibility" misrepresents the purpose of 49 C.F.R. § 387. *See* Telecom's Supplemental Brief at 6. The federal regulation does not speak to what constitutes a properly capitalized motor carrier

rectly disputed the specific allegations of undercapitalization that have been made by plaintiff and Flexi-Van. As for showing that Contrux was undercapitalized for an improper purpose, the court finds that the evidence submitted on this issue has failed to resolve this material factual dispute. Given that a determination of a corporation's financial status is a question of fact, the court finds that the question is best left for the trier of fact to resolve.

B. *Proximate Causation*

The final element required before finding that an alter ego relationship exists is one of proximate causation. The specific language used by the court in *Collet* provides that the "aforesaid control and breach of duty *must proximately cause the injury or unjust loss complained of.*" *Collet*, 708 S.W.2d at 284 (emphasis added). In reliance on this language, the court of appeals, in its opinion reversing the court's order of dismissal, states that in the event plaintiff ascertains facts to establish Contrux was undercapitalized

> . . . he also will have to show that *Telecom's control of Contrux and Contrux's undercapitalization proximately caused his injury* in order for the district court to exercise personal jurisdiction over Telecom.

Slip op. at 6 (emphasis added).

1. Plaintiff's Alleged Injury

Plaintiff claims that the injury proximately caused by Contrux's undercapitalization is his inability to "collect his full damages from Contrux because of its insolvency."

---

company. Rather, the regulation speaks to what constitutes an appropriate level of *financial responsibility*. The regulation defines financial responsibility as "the financial reserves (e.g., insurance policies or surety bonds) *sufficient to satisfy liability* amounts set forth in this subpart covering public liability." 49 C.F.R. § 387.5 (emphasis added).

See Plaintiff's Suggestions in Opposition at 13. In response, Telecom argues that the injury plaintiff alleges proximately flows from Contrux's alleged undercapitalization is merely speculative in nature. The claimed injury hinges on two things: 1) that plaintiff obtain a verdict against Contrux, and 2) that plaintiff subsequently is unable to collect his full damages from Contrux. Since plaintiff has not obtained a verdict against Contrux, Telecom continues, his claimed injury is at best "unliquidated" and fails to support an allegation of proximate causation under the third prong of the *Collet* test.

Based on the criteria set forth in *Collet* and restated by the Eighth Circuit in its opinion, the court finds that plaintiff has failed to allege he suffered an injury proximately caused by Contrux's alleged undercapitalization. Plaintiff provides no authority in support of the proposition that an unliquidated claim may be used to establish proximate causation. In fact, plaintiff admits as much to the contrary. In his brief in opposing Telecom's motion to dismiss, plaintiff states:

> The long and the short of it is if the plaintiff is successful in convincing the jury that they should find for plaintiff *and* the corporate veil protecting Telecom should be pierced, then jurisdiction will lie. If the plaintiff is unsuccessful, there is no jurisdiction over Telecom.

Plaintiff's Suggestions in Opposition at 6 (emphasis added). The language used in *Collet* likewise fails to support the view that a speculative injury would fulfill the proximate causation element. The *Collet* court speaks of the injury "complained of." One cannot seek recompense for an injury that has yet to occur. Consequently, the court finds it has no personal jurisdiction over Telecom in the action brought by plaintiff.

2. Flexi-Van's Alleged Injury

Flexi-Van alleges that it suffered an injury when Contrux failed to carry out the terms of a contract the two

parties entered into. In June 1984 Flexi-Van and Contrux entered into a leasing agreement whereby Flexi-Van leased certain vehicles to Contrux for use in its motor carrier business. The leasing agreement contained an indemnification clause which provided in pertinent part:

> "Lessee [Contrux] . . . at its sole cost and expense, assume full responsibility for and does agree to defend and hold Lessor [Flexi-Van] free and harmless against any and all liability, claim, demand, suit, action or proceeding . . . for death, injury or damage to property or person, arising out of the use, operation, maintenance, transportation, and possession of the Equipment by Lessee . . . and Lessee further agrees to defend, at its sole expense, all claims arising out of such injuries or damages."

Flexi-Van asserts the leasing agreement was breached when Contrux failed, upon request, to defend and indemnify Flexi-Van in the present matter. Contrux failed to fulfill its contractual indemnity obligations because it was undercapitalized and unable to do so. Telecom's response is that like plaintiff's injury Flexi-Van's injury is merely speculative. Telecom argues that Flexi-Van's right to indemnification under the leasing agreement is "entirely dependent upon a judgment against it. Without a judgment, Flexi-Van has no indemnification right, and cannot state a claim upon which relief can be granted." *See* Brief in Support of Telecom's Motion to Dismiss at 7.

Based upon the plain language of the leasing agreement Flexi-Van has been injured by Contrux's failure to represent and defend Flexi-Van in the current suit. Telecom's suggestion that the indemnity clause is not triggered until a judgment is entered against Contrux and Flexi-Van is not supported by the text of the clause. As quoted above, Contrux, as lessee under the contract, had a duty "to defend, at its sole expense, all claims arising out of such injuries or damages." Clearly, a party's duty to defend cannot be contingent upon on event

occurring after the fact—in this case, the entry of a judgment. The court also finds it plausible that Contrux's refusal to honor the indemnity clause provision may have been precipitated by its undercapitalized condition. Thus, the court concludes that Flexi-Van has made a prima facie showing that it sustained an injury and that injury was proximately caused by Contrux's alleged undercapitalization.

II. CONCLUSION

Therefore, it is

ORDERED that Telecom's Motion to Dismiss Plaintiff's First Amended Complaint is granted. It is further

ORDERED that Telecom's Motion to Dismiss Cross-Claim of Defendant Flexi-Van Leasing, Inc. is denied. It is further

ORDERED that defendant Flexi-Van's and plaintiff's requests for an oral argument on the pending motions for dismissal, pursuant to Local Rule 13F, is denied as moot.

/s/ Dean Whipple
DEAN WHIPPLE
United States District Judge

DATED: OCTOBER 25, 1990.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1013

KONRAD RADASZEWSKI, by CECILIA RADASZEWSKI, his duly appointed guardian of the person and estate,
Appellant,

v.

CONTRUX, INC., DAN LESLIE SATTERFIELD; TELCOM CORPORATION,
Appellees.

FLEXI VAN LEASING, INC.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: February 13, 1989

Filed: December 13, 1989

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

HEANEY, Senior Circuit Judge.

Konrad Radaszewski appeals from the order of the district court sustaining defendant Telecom Corporation's (Telecom) motion to dismiss for lack of personal jurisdiction. We reverse and remand.

BACKGROUND

Radaszewski suffered a permanent brain injury when a truck driven by Dan Leslie Satterfield, an employee of Contrux, Inc. (Contrux), struck him by the side of a road in Independence, Missouri. Contrux was a wholly-owned subsidiary of Telecom. Telecom and Contrux both were incorporated under the laws of Texas, but Contrux is insolvent and no longer in good standing. Telecom does no business in Missouri and has no other connections with the state. Radaszewski is a resident of Wisconsin.

Radaszewski originally brought this tort action in Missouri state court. He claims jurisdiction under Missouri's long-arm statute, which provides personal jurisdiction over a foreign defendant who has committed a tort in Missouri. *See* Mo. Ann. Stat. § 506.500 (Vernon Supp. 1988). He claims that Telecom's corporate veil should be pierced to attribute the tort of Satterfield, Contrux's agent, to Telecom. Radaszewski alleges that Telecom should be held liable for the tort attributable to Contrux because Telecom was the sole owner of Contrux, Contrux was undercapitalized, and Contrux merely served as Telecom's alter-ego and was not really a separate corporation.

The district court determined that Radaszewski had alleged insufficient facts to show that Contrux and Telecom were not separate corporations. Consequently, Radaszewski had failed to establish a prima facie case that Telecom had committed a tort in Missouri. Because Radaszewski had failed to connect Telecom to Satterfield's tort, the district court granted Telecom's motion to dismiss for lack of personal jurisdiction.

Radaszewski moved the district court to reconsider its order of dismissal because he had been unable to obtain discovery sufficient to establish the factual basis necessary for an exercise of personal jurisdiction. In the alternative, Radaszewski moved that the order of dismissal be designated immediately appealable pursuant to 28 U.S.C. § 1292(b) (1982), because his claim involves a controlling issue of law about which substantial ground for difference of opinion exists. Concluding that an immediate appeal might materially advance the ultimate termination of the litigation, the district court granted Radaszewski's alternative motion. This appeal ensued.

ANALYSIS

Determining the propriety of an exercise of personal jurisdiction over a foreign defendant is a two-step process. *Hanline v. Sinclair Global Brokerage Corp.*, 652 F. Supp. 1457, 1458 (W.D. Mo. 1987). The court must determine whether the exercise comports with the requirements of the long-arm statute of the state in which it sits. *See Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 653 (8th Cir. 1982). The court also must ensure that sufficient minimum contacts exist between the defendant and the forum state for the exercise of jurisdiction not to offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The Missouri long-arm statute permits personal jurisdiction over a foreign defendant who has committed a tortious act within the state. *See* Mo. Ann. Stat. § 506.500(3) (Vernon Supp. 1988). This statute has withstood constitutional challenge. *See State ex rel. Deere & Co. v. Pinnell*, 454 S.W.2d 889, 892-93 (Mo. 1970) (en banc).

Telecom removed the case to the federal district court for the Western District of Missouri, and then moved for dismissal for lack of personal jurisdiction. Telecom ar-

gued that because it did no business in Missouri and because Contrux was a separate corporation, torts attributable to Contrux did not suffice to extend personal jurisdiction over Telecom under Missouri's long-arm statute.

Ordinarily, Missouri law will protect the separate legal identities of two corporations, even when one corporation owns a part or all of the other. *Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 273, 283 (Mo. Ct. App. 1986). If one corporation exercises such control over the other that the latter becomes a mere alter ego of the first, however, and if the formal corporate separateness and arrangements between the two corporations are used to achieve fraud, injustice, or an unlawful purpose, a court may ignore the separate formal corporate structures and "pierce the corporate veil" of the controlling corporation. *Id.* at 284.

Missouri courts have established three requirements for piercing the corporate veil. First, the party seeking to prove that two corporations are not separate entities must show control by one corporation over the other. *Id.* (citing *National Bond Finance Co. v. General Motors Corp.*, 238 F. Supp. 248, 255 (W.D. Mo. 1964)). "Control" in this context means "complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own." *Id.* Second, such control must have been used to commit fraud, wrong, a violation of a statutory or other legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights. *Id.* Finally, the control and breach of duty must have proximately caused the injury of which plaintiff complains. *Id.*

Radaszewski alleged that Telecom solely owned Contrux, that Telecom controlled and manipulated Contrux, that Contrux was too inadequately capitalized to function properly, that Telecom and Contrux shared common

officers and directors, that Telecom maintained Contrux's licenses to do business in various states, that Telecom prepared and paid Contrux's taxes, and that Telecom directed Sontrux's day-to-day business affairs. Thus, Radaszewski pleaded sufficient facts to satisfy the first requirement for piercing the corporate veil. *See Collet*, 708 S.W.2d at 284.

The district court found that Radaszewski had failed to establish that Telecom used Contrux to commit fraud, to breach a legal duty, or to violate Radaszewski's legal rights. Radaszewski alleged that Contrux was undercapitalized when incorporated and remained undercapitalized throughout its life. Missouri courts will disregard the existence of a corporate entity that is operated while undercapitalized. *Grote Meat Co. v. Goldenberg*, 735 S.W.2d 379, 387 (Mo. Ct. App. 1987) (citing *Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 273, 286-87 (Mo. Ct. App. 1986)). Defendant Telecom, however, denied the allegation that Contrux was undercapitalized.

The matters on which Radaszewski sought discovery from Telecom included Contrux's capitalization. Telecom initially moved to suspend discovery pending the district court's ruling on its motion to dismiss for lack of personal jurisdiction. The district court denied the motion to suspend discovery on June 14, 1988. It ordered the claim dismissed on August 23, 1988. Because the district court concluded that discovery should have been proceeding between June 14 and August 23, 1988, it denied Radaszewski's subsequent motion to reconsider the dismissal based on Radaszewski's inability to obtain discovery sufficient to establish the facts necessary to provide personal jurisdiction.

The district court apparently concluded that further discovery would not enable Radaszewski to obtain evidence sufficient to establish personal jurisdiction because Telecom had served its answers to Radaszewski's opening

interrogatories on August 18, 1988. As Radaszewski notes, however, Telecom's answers consisted primarily of objections to every substantive discovery request that Radaszewski had propounded. Following entry of the district court's order of dismissal, Telecom informed Radaszewski that, in view of the court's order, it would provide no discovery.

Because only four days elapsed between Telecom's serving answers to Radaszewski's interrogatories and the district court's dismissal of the claim, Radaszewski had little realistic opportunity to ascertain through additional discovery whether Contrux had in fact been undercapitalized. We therefore remand the case to the district court with instructions to allow Radaszewski 60 days additional discovery to try to ascertain facts in support of his allegation that Contrux was undercapitalized throughout its existence. Should Radaszewski ascertain such facts, he also will have to show that Telecom's control of Contrux and Contrux's undercapitalization proximately caused his injury in order for the district court to exercise personal jurisdiction over Telecom. *See* Mo. Ann. Stat. § 506.500 (Vernon Supp. 1988); *Collet*, 708 S.W.2d at 284.

We reverse the order of the district court dismissing Radaszewski's claim and remand the case for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 88-0445-CV-W-1

KONRAD RADESZEWSKI,
Plaintiff,

v.

CONTRUX, INC., *et al.*,
Defendants.

ORDER

[Filed Aug. 23, 1988]

Before the court is a motion, filed May 20, 1988, by defendant Telecom Corporation to dismiss plaintiff's claims against it for lack of personal jurisdiction. For the reasons set forth below, the motion will be granted.

FACTS

Plaintiff alleges he suffered damages arising from an accident in which he was struck by a truck driven by defendant Satterfield, an employee of defendant Contrux, Inc., which was a subsidiary of defendant Telecom. In Count II, plaintiff alleges that Telecom was the sole owner and alter ego of Contrux:

> * * * At all times mentioned, the business affairs of defendant Contrux, Inc., were controlled and manipulated by defendant Telecom Corporation and Contrux, Inc. was inadequately capitalized to prop-

erly function in an independant [sic] capacity separate from Telecom Corporation.

12. Defendant Contrux, Inc., was formed by defendant Telecom Corporation for the sole purpose of establishing a common carrier that would function as a non-union company to replace Spector Red Ball, another wholly owned subsidiary of Telecom Corporation that was highly unionized. As such, all of the officers of Contrux were also officers of Telecom Corporation. Telecom maintained Contrux's licenses to do business in various states of the union, prepared and paid taxes owed by Contrux and directed the day[-]to[-]day business affairs of Contrux.

13. As such, defendant Contrux was at all times under such domination of defendant Telecom so as to make Contrux a mere instrument and the alter ego of defendant Telecom each being indistinct from the other.

14. As a result of the foregoing, any corporate distinction between defendants Contrux and Telecom should be disregarded and defendant Telecom Corporation is therefore legally liable for the wrongful acts of defendant Contrux, Inc. and its agents, servants and employees, including those negligent acts set forth in paragraph 7.

15. As a direct and proximate result of the negligent acts of defendants Satterfield, Contrux, Inc. and Telecom Corporation, acting by and through defendant Satterfield and Contrux, Inc., plaintiff Konrad Radeszewski has sustained the permanent and sever damages set forth in paragraph 8 above.

In its motion, Telecom challenges personal jurisdiction. Telecom asserts that it is a Texas corporation which does not do business in Missouri, has no connections to Missouri and therefore is not subject to jurisdiction under the Missouri "long-arm" statute.

Plaintiff responded, on June 9, 1988, that Contrux was a mere instrumentality of Telecom. Plaintiff argues that, as the alter ego of Contrux, Telecom is subject to jurisdiction under the long-arm statute by having committed a tortious act within the Missouri.

DISCUSSION

Determining the propriety of an exercise of personal jurisdiction over a non-resident defendant is a two-step process. *Hanline v. Sinclair Global Brokerage Corp.*, 652 F.Supp. 1457, 1458 (W.D.Mo. 1987). First, the court must determine that the exercise comports with the requirements of the long-arm statute of the state in which it sits. *See Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 653 (8th Cir. 1982). Second, the court must ensure that minimum contacts exist between each defendant and the forum state such that the exercise of personal jurisdiction does not offend the notions of fair play and substantial justice under the due-process clause. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The Missouri long-arm statute, Mo.Ann.Stat. Section 506.500 (Vernon Supp. 1988), confers jurisdiction over a person as to any cause of action arising any of several means. Those include, among others, the commission of a tortious act within the state. The scope of the statute was meant to be as broad as is consistent with the dictates of due process. *Hanline v. Sinclair Global Brokerage Corp., supra; See, State ex rel. Deere and Co. v. Pinnell*, 454 S.W.2d 889, 892 (Mo.1970) (*en banc*).

Plaintiff, the party that is seeking to invoke federal jurisdiction, has the burden of establishing that jurisdiction exists, and this burden may not be shifted to the party challenging the jurisdiction. *Hanline v. Sinclair Global Brokerage Corp., supra*, at 1458-1459; *United States v. Bliss*, 108 F.R.D. 127, 129 (E.D.Mo. 1985); *Mountaire Feeds, Inc. v. Agro Impex, S.A., supra*, 677

F.2d at 653. The plaintiff's complaint must allege sufficient facts "to support a reasonable inference that the defendant can be subjected to the jurisdiction within the state." *Hanline v. Sinclair Global Brokerage Corp., supra, quoting Institutional Food Marketing Associates, Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 448, 453 (8th Cir. 1984). While the facts are viewed in the light most favorable to the plaintiffs, "there must nonetheless be some evidence upon which a prima facie showing of jurisdiction may be found to exist. . . ." *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977) (citations omitted); *United States v. Bliss, supra*, at 129.

Telecom's motion does not challenge whether a prima facie showing of a tortious act has been made in the petition. Rather, Telecom challenge whether there has been a showing that it was Telecom, which committed the tort. Plaintiff bases his claim of jurisdiction upon Telecom's control over Contrux, alleging that Telecom is the alter ego of Contrux and therefore is subject to jurisdiction if a Contrux employee committed a tortious act in Missouri. The linchpin is whether Telecom and Contrux are separate corporations.

If a subsidiary's presence in the state is primarily to carry on its own business and the subsidiary has preserved some semblance of independence from the parent, jurisdiction over the parent may not be acquired on the basis of local activities. *United States v. Bliss, supra*, at 131. There is a presumption of corporate separateness that must be overcome by clear evidence that the parent in fact controls the activities of the subsidiary. *Ibid.* A court may not exercise jurisdiction solely because a parent owns all the stock of its subsidiary. *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980); *Cannon Manufacturing Company v. Cudahy Packing Company*, 267 U.S. 333, 335 (1925).

Courts have applied different tests in determining whether two corporations are sufficiently separate to preclude jurisdiction over the parent corporation. In *United States v. Bliss*, *supra* at 131, the court said the plaintiff at least must demonstrate that the defendants did not maintain corporate formalities. In the same case, the court quoted from *Thunderbird Motor Freight Lines v. Consolidated Pipe & Supply*, No. 83-1791 (E.D.Mo. October 23, 1983), where the court had focused on the parent's lack of control over day-to-day operations. Plaintiff relies upon a test he calls the "instrumentality" theory and quotes *Acme Precision Products Inc. v. American Alloys Corp.*, 422 F.2d 1395, 1398 (8th Cir. 1970):

> . . . [T]he law is clear that where a subsidiary corporation acts as a direct instrumentality of and indirect cooperation with its parent corporation, and where the properties and affairs of the two are so inextricably confused as to a particular transaction, the corporate structures cannot exist separate from one another.

Nevertheless, this court feels bound by a more recent pronouncement by the Eighth Circuit Court of Appeals, wherein the long-arm statute was applied according to more reecnt Missouri case law. In *A.L. Laboratories, Inc. v. Philips Roxane*, 803 F.2d 378, 385 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 1632 (1987), the court considered whether a parent company could be held responsible for the tortious acts of its subsidiary:

> Corporate forms may be disregarded and separate entities treated as one only where a two-prong test is met: "Not only must the corporation be controlled and influenced by one or a few persons, in addition, the evidence must establish that the corporate cloak was used as a subterfuge to defeat public convenience, to justify wrong or to perpetuate fraud." *Fairbanks v. Chambers*, 665 S.W.2d 33, 37 (Mo.Ct.

> App. 1984). Thus, full ownership, with concomitant dominance and control, is insufficient to justify "piercing the corporate veil"; rather, a plaintiff must prove that equity requires that the parent and subsidiary be treated as one. *Camelot Carpets v. Metro Distrbuiting Co.*, 607 S.W.2d 746, 749-750 (Mo.Ct. App. 1980) (quoting *Lawton-Byrne-Bruner Insurance Agency Co. v. Stiers Brothers Construction Co.*, 186 S.W.2d 480, 484-485 (Mo.Ct.App. 1945)) *see also, Community Title Co. v. Roosevelt Federal Savings & Loan Association*, 670 S.W.2d 895, 905 n.8 (Mo.Ct.App. 1984) (dicta).

Plaintiff attempted in the petition to show that Contrux was so completely dominated by Telecom that Contrux was the alter ego of Telecom. The allegations are that Telecom controlled and manipulated Contrux, which was too inadequately capitalized to function properly. The petition alleges that Telecom maintained Contrux's licenses to do business in various states, prepared and paid the taxes owed by Contrux, and conducted the day-to-day business affairs of Contrux. Such allegations would appear to satisfy the first part of the test applied in *A.L. Laboratories, Inc. v. Philips Roxane, supra.*

The second part of the test is somewhat more troublesome. The petition alleges that Contrux was established by Telecom for the sole purpose of establishing a common carrier that would function as a non-union company to replace Spector Red Ball. Spector Red Ball was another wholly owned subsidiary of Telecom and was "highly unionized," according to the petition. The presence of this allegation in the petition and in plaintiff's opposition to the motion may imply that plaintiff believes something is wrong about forming a corporation for such a purpose. However, among all the reasons for forming a corporation, there is nothing patently improper about the alleged purpose in forming this corporation.

This court is unable to find, on the basis of what is before it, that Contrux was created and operated such that "the corporate cloak was used as a subterfuge to defeat public convenience, justify wrong, or perpetuate fraud." The closest plaintiff comes to establishing some improper purpose in forming Contrux is his allegation that Contrux was undercapitalized.

Where a company is operated without sufficient funds to meet obligations to those who must deal with it, that would be circumstantial evidence tending to show either improper purpose or reckless disregard of the rights of others." *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 54-55 (Mo. 1937). Telecom denies plaintiff's allegation of under capitalization. As stated above, the burden is upon the plaintiff to establish jurisdiction. On this point, plaintiff has not met the burden in regard to defendant Telecom.

CONCLUSION

In the absence of sufficient allegations of a prima facie case that Telecom committed a tortious act in Missouri, the court can find no personal jurisdiction over Telecom on that basis.

It is

ORDERED that defendant Telecom Corporation's motion, filed May 20, 1988, to dismiss is granted. It is further

ORDERED that plaintiff's claims against Telecom Corporation are dismissed.

/s/ Dean Whipple
DEAN WHIPPLE
United States District Judge

DATED: AUGUST 23rd, 1988.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1342/1343WMKC

KONRAD RADASZEWSKI, ETC.,
Appellant/Cross-Appellee,

vs.

CONTRUX, INC., *et al.*,
Appellees/Cross-Appellants.

Appeal from the United States District Court
for the Western District of Missouri

The petition for rehearing is denied.

December 14, 1992

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals
Eighth Circuit

Supreme Court, U.S.
FILED
APR 15 1993
OFFICE OF THE CLERK

No. 92-1481

In The

Supreme Court of the United States

October Term, 1992

KONRAD RADASZEWSKI, by
CECILIA RADASZEWSKI, His Guardian,

Petitioner,

v.

TELECOM CORPORATION,

Respondent.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. KROENERT
R. CHRISTOPHER ABELE*
RICHARD W. MOREFIELD, JR.
MORRISON & HECKER
2600 Grand Avenue
Kansas City, Missouri
64108-4606
(816) 691-2600

Attorneys for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the court of appeals properly grant Telecom's motion to dismiss for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted in light of petitioner's failure to produce evidence that Contrux was operated with an improper purpose as to petitioner?

2. Did the court of appeals follow Missouri common law and policy when it held that Contrux was not operated with an improper purpose to evade petitioner's personal injury claim because Contrux purchased substantially more insurance than required under federal financial responsibility regulations governing the trucking industry?

LIST OF PARTIES

Petitioner Konrad Radaszewski

Respondent Telecom Corporation[1]

Contrux, Inc.

Dan Leslie Satterfield

Flexi-Van, Inc.

---

[1] The following corporations are subsidiaries of Telecom: Meyer Machine Company, A.L. Investors, Inc., Corporate Realty Services, Inc., Corporate Realty Services of Ohio, Inc., TeleCom Industrial Group, Inc., K-A Enterprises, Inc., Contrux, Inc., MRA Asset Holding Co., Flower Mound Holding Co., Inc., Sachse 5 and 33, Inc., Comfort Supply, Inc., TeleCom Real Estate Group, Inc., TeleCom Properties, Inc., Texas Capital Corporation, Meyer Tempco, Inc., A.L. Brewer Corporation, Southwest Dallas 10, Inc., Meyer Europe Limited, Meyer Vi-Tech Limited.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

STATUTES AND RULES INVOLVED 1

STATEMENT OF THE CASE 1

1. Factual Background 1

2. Proceedings in the Lower Courts 4

REASONS FOR DENYING THE WRIT 5

I. THE COURT OF APPEALS PROPERLY APPLIED DUE PROCESS PRINCIPLES AND MISSOURI LAW WHEN IT DISMISSED PETITIONER'S AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION 6

A. Petitioner Cannot Establish That Telecom Falls Within The Reach Of The Missouri Long-Arm Statute Unless He Proves Contrux Is Telecom's Alter Ego 6

B. The Court Of Appeals Dismissed Petitioner's Amended Complaint Because He Failed To Present Evidence To Support The Improper Purpose Element Of His Action To Pierce The Corporate Veil 7

1. Under Missouri Law, Petitioner Must Prove An Improper Purpose, Not Mere Undercapitalization 8

2. As A Matter Of Law, Contrux Was Not Operated With An Improper Purpose ... 12

TABLE OF CONTENTS – Continued

Page

C. Personal Jurisdiction Over Telecom Is Inconsistent With Fundamental Principles Of Due Process..... 16

D. The Court Of Appeals' Dismissal Of Petitioner's Complaint Against Telecom Is Consistent With Public Policy As Established By Missouri Courts..... 18

II. THE COURT OF APPEALS PROPERLY GRANTED TELECOM'S MOTION TO DISMISS PETITIONER'S AMENDED COMPLAINT PURSUANT TO RULES 12(b)(2) AND 12(b)(6)..... 19

A. The United States Supreme Court Should Not Grant The Petition For Writ Of Certiorari Because Petitioner Did Not Oppose The Burden Of Proof Adopted By The Lower Courts..... 19

B. Petitioner Failed To Present Any Evidence That Contrux Was Operated With An Improper Purpose As To Petitioner..... 20

C. The District Court And The Court Of Appeals Adopted The Prima Facie Evidence Standard Urged By Petitioner..... 23

D. The Eighth Circuit Is Not In Conflict With Other Circuit Courts Regarding The Appropriate Standard To Apply On Rule 12(b)(2) And Rule 12(b)(6) Motions To Dismiss.... 26

E. The Court Of Appeals Did Not Improperly Transform Telecom's Motion To Dismiss Into A Summary Judgment Motion..... 27

F. The Court of Appeals and the District Court Did Not Violate Petitioner's Due Process Rights When They Dismissed His Complaint..... 28

TABLE OF CONTENTS – Continued

Page

G. Petitioner Was Aware Of The Evidentiary Nature Of The Proceedings On Telecom's Motion To Dismiss 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

A.L. Lab., Inc. v. Philips Roxane, Inc., 803 F.2d 378 (8th Cir. 1986), *cert. denied*, 481 U.S. 1007 (1987) . . 7, 11

Aaron Ferer & Sons Co. v. Diversified Metals Corp., 564 F.2d 1211 (8th Cir. 1977) 25, 26

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 27

Atlas Construction Co. v. Slater, 746 P.2d 352 (Wyo. 1987) 16

Bialek v. Racal-Milgo, Inc., 545 F. Supp. 25 (S.D.N.Y. 1982) 26

Block Industries v. D.H.J. Industries, Inc., 495 F.2d 256 (8th Cir. 1974) 24

Collet v. American National Stores, Inc., 708 S.W.2d 273 (Mo. App. 1986) . . . . . *passim*

Crimm v. Mo. Pac. R.R. Co., 750 F.2d 703 (8th Cir. 1984) 13

Dakota Industries v. Dakota Sportswear, 946 F.2d 1384 (8th Cir. 1991) 24, 25, 26

Data Disc, Inc. v. Systems Technology Assoc., Inc., 557 F.2d 1280 (9th Cir. 1977) 26

C.C. Dillon Co. v. Robinson, 636 S.W.2d 380 (Mo. App. 1982) 10

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 6, 11

Grote Meat Co. v. Goldenberg, 735 S.W.2d 379 (Mo. App. 1987) 10

TABLE OF AUTHORITIES – Continued

Page

H.H. Robertson Co. v. V.S. DiCarlo Gen. Contr., Inc., 789 F. Supp. 998 (E.D. Mo. 1992) 10

Hanline v. Sinclair Global Brokerage Corp., 652 F. Supp. 1457 (W.D. Mo. 1987) 24

Hanson v. Denckla, 357 U.S. 235 (1958) 16

Institutional Food Mktg. Assoc. v. Golden State Strawberries, Inc., 747 F.2d 448 (8th Cir. 1984) 24

International Shoe Co. v. Washington, 326 U.S. 310 (1944) 16, 17

Lawton-Byrne-Bruner Ins. Agency Co. v. Stiers Bros. Const. Co., 186 S.W.2d 480 (Mo. App. 1945), *rev'd on other grounds*, 190 S.W.2d 880 (Mo. 1945) 9

Marine Midland Bank, N.A. v. Miller, 664 F.2d 899 (2nd Cir. 1981) 26

May Dept. Stores v. Union Elec. Light & Power Co., 107 S.W.2d 41 (Mo. 1937) 9

Northern Heel Corp. v. Compo Industries, Inc., 851 F.2d 456 (1st Cir. 1988) 13

Omaha Indemnity Co. v. Royal American Managers, Inc., 755 F. Supp. 1451 (W.D. Mo. 1991) 10

Publications Group, Inc. v. Am. Soc. of Heating, Refrig. and Air Conditioning Engineers, Inc., 566 F. Supp. 316 (D. Conn. 1983) 25

Ring v. First Interstate Mortg., Inc., 984 F.2d 924 (8th Cir. 1993) 25

Sea-Land Services, Inc. v. Pepper Source, 941 F.2d 519 (7th Cir. 1991) 12

TABLE OF AUTHORITIES – Continued

Page

Thompson v. Ecological Science Corp., 295 F. Supp. 1307 (E.D. Ark. 1969), *rev'd on other grounds*, 421 F.2d 467 (8th Cir. 1970) 24

Timeshare Vacation Club v. Atlantic Resorts, Limited, 735 F.2d 61 (3rd Cir. 1984) 24

Watlow Elec. Mfg. v. Patch Rubber Co., 838 F.2d 999 (8th Cir. 1988) 25

Welsh v. Gibbs, 631 F.2d 436 (6th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981) 25

Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 17

STATUTES AND REGULATIONS

28 U.S.C. § 1292(b) 4

44 U.S.C. § 1507 13

49 C.F.R. § 387.1 ..... 1, 13

49 C.F.R. § 387.3 1

49 C.F.R. § 387.5 ..... 1, 21, 22

49 C.F.R. § 387.7 ..... 1, 21

49 C.F.R. § 387.9 ..... 1, 2, 13, 15, 21

49 U.S.C. § 10101 ..... 1, 2, 12, 13, 14

Fed. R. Civ. P. 12(b)(2) ..... *passim*

Fed. R. Civ. P. 12(b)(6) ..... *passim*

Fed. R. Civ. P. 56 ..... 1, 7

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Evid. 201 13

Mo. Ann. Stat. § 506.500 ..... 1, 6, 7

OTHER AUTHORITIES

5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1351 (1990) 24

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Telecom Corporation respectfully requests the Court to deny the Petition of Konrad Radaszewski for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

STATUTES AND RULES INVOLVED

This case involves the application of the Missouri Long-Arm Statute, Mo. Ann. Stat. § 506.500; Federal Rules of Civil Procedure 12(b)(2), 12(b)(6) and 56; and federal statutes and regulations governing financial responsibility for motor carriers, 49 U.S.C. § 10101 and 49 C.F.R. §§ 387.1, 387.3, 387.5, 387.7 and 387.9.

STATEMENT OF THE CASE

1. Factual Background

Telecom Corporation is a Texas corporation that does not transact business in the State of Missouri. Petitioner Konrad Radaszewski filed suit against Telecom in the United States District Court for the Western District of Missouri alleging that Telecom is liable for his injuries, which allegedly were caused by the negligence of Dan Leslie Satterfield. Satterfield never worked for or with Telecom, nor has he had any relationship with the company. Satterfield worked as a truck driver for Contrux, a Telecom subsidiary that had its principal place of business in Illinois.

The essence of petitioner's claim is that Contrux is the mere instrumentality and alter ego of Telecom, and that the alleged respondeat superior liability of Contrux for any negligence of Satterfield should be imputed to Telecom. Petitioner filed suit against Telecom after he discovered that Contrux's excess liability insurance carrier, Integrity Insurance Company, was in receivership.

Contrux has a $1 million primary liability insurance policy with the Insurance Company of Pennsylvania and a $10 million excess liability insurance policy with Integrity.

To impute Contrux's alleged respondeat superior liability to Telecom and to establish personal jurisdiction over Telecom, petitioner must prove the elements of an action to pierce Contrux's corporate veil. Under Missouri law, petitioner must prove Telecom (1) controlled Contrux (2) for an improper purpose (3) that proximately caused an injury to him. *Collet v. American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986). To that end, petitioner pleaded that Telecom controlled Contrux, that Contrux was undercapitalized, that Telecom formed Contrux for the sole purpose of establishing a non-union subsidiary to take business from Specter Red Ball, a Telecom subsidiary that suffered from labor difficulties, and that these factors caused an unspecified injury to him. Petitioner, however, has not offered any evidence that Telecom actually had an improper purpose as to him. Telecom thus moved to dismiss petitioner's complaint for failure to state a claim upon which relief can be granted and for lack of personal jurisdiction.

Contrux was formed in 1980, and was engaged in interstate trucking between 1981 and 1985. Caught in the destructive competition that arose from the deregulation of the trucking industry in the 1980's, Contrux was unable to operate profitably despite Telecom's constant infusion of capital. During Contrux's five years of operations, Telecom contributed more than $750,000 in loans and capital to Contrux to enable it to operate. When Contrux ceased operations in 1985, Telecom did not recover its investment.[1]

---

[1] Although for purposes of Telecom's Rule 12(b)(2) and 12(b)(6) motion to dismiss Telecom does not challenge peti-

Contrux financially prepared itself for potential tort liability by substantially exceeding the federal financial responsibility regulations for motor carriers. Contrux obtained a $1,000,000 primary liability insurance policy that fully satisfied the regulations. In addition, Contrux chose to provide additional protection for potential tort claimants such as petitioner by purchasing a $10 million excess liability policy from Integrity Insurance Company. The regulations, designed to protect individuals such as petitioner, require all motor carriers to obtain liability insurance of $500,000 to $1,000,000, or obtain permission to self-insure. 49 U.S.C. § 10101(a); 49 C.F.R. § 387.9. There is no dispute that Contrux's coverage has already benefitted petitioner, who has obtained nearly $1 million from Contrux's primary insurance carrier in partial settlement of his claims.

On August 21, 1984, petitioner claims he was injured when an eighteen wheel tractor-trailer unit driven by Satterfield collided with him. Petitioner originally filed suit against only Satterfield, Contrux and Flexi-Van Leasing, Inc. (a former party) in Illinois. The Illinois court dismissed the action on forum non conveniens grounds.

On March 24, 1987, Contrux's excess liability insurance carrier, Integrity, was placed in receivership. After Integrity went into receivership, petitioner filed suit in Missouri against Telecom and the other defendants. It is not known whether the Integrity receivership will affect petitioner's ability to collect a judgment against Contrux if he obtains one. It undoubtedly is this uncertainty, however, that has led petitioner to attempt to pierce the corporate veil of Contrux to reach Telecom's assets.

---

tioner's allegation that Contrux was undercapitalized, it is important to note there is no evidence that Telecom stripped Contrux of assets or intended for Contrux to evade tort claims. To the contrary, the evidence is that Telecom poured money into Contrux, but ultimately did not see a return on its investment.

2. Proceedings in the Lower Courts

Petitioner filed his complaint against Contrux, Flexi-Van and Telecom in the district court. Petitioner's sole basis for filing suit against Telecom and for establishing personal jurisdiction over Telecom in the State of Missouri was his claim that Telecom was the alter ego of Contrux.

Telecom moved to dismiss petitioner's claims against Telecom for lack of personal jurisdiction and for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(2), (6). After extensive briefing, the district court dismissed Telecom on both grounds, and designated the order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Petitioner appealed. In its December 13, 1989 opinion, the United States Court of Appeals for the Eighth Circuit reversed and remanded the case for sixty days to allow petitioner an opportunity to discover facts that might support his claim that Telecom was the alter ego of Contrux. Petitioner conducted extensive document and deposition discovery.

After this discovery period, petitioner filed an amended complaint. As in his first complaint, petitioner alleged Telecom's sole purpose for creating Contrux was to establish a non-union common carrier to compete with Specter Red Ball.

Telecom moved to dismiss the amended complaint for lack of personal jurisdiction and for failure to state a claim upon which relief could be granted. The district court dismissed petitioner's amended claims against Telecom for want of jurisdiction, but did so without prejudice, holding that petitioner's amended claims against Telecom were premature because he has not yet suffered an injury resulting from Contrux's alleged inability to satisfy a judgment. The district court designated its order immediately appealable pursuant to 28 U.S.C. § 1292(b).

In its November 12, 1992 opinion, the court of appeals affirmed the district court's dismissal of Telecom, but reversed the portion of the district court's order designating the dismissal "without prejudice". The court of appeals concluded petitioner had failed to present any evidence to support the improper purpose element of his cause of action.

REASONS FOR DENYING THE WRIT

This is a case in which the court of appeals properly granted Telecom's motion to dismiss because petitioner failed to present any evidence supporting a necessary element of his claim.

Petitioner principally claims, without merit, that the court of appeals' decision is in conflict with other circuits' standards for ruling on motions to dismiss. An examination of the opinion below demonstrates that in evaluating Telecom's motion to dismiss, the court of appeals properly adopted the prima facie evidence standard used in other circuits. Moreover, this case does not actually involve any meaningful issue as to burden of proof because petitioner failed to present *any* evidence to support the improper purpose element of his cause of action.

Neither has petitioner suffered a Seventh Amendment deprivation. There is no issue for a jury in this case. The decisions by the lower courts are consistent.

The court of appeals' analysis of petitioner's alter ego cause of action was based on the common law of the State of Missouri as set forth in *Collet v. American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986). To pierce Contrux's corporate veil, petitioner must establish that Telecom controlled Contrux, that Telecom exercised that control for an improper purpose, and that Telecom's control of Contrux and its improper purpose proximately caused an injury to him. *Collet*, 708 S.W.2d at 284. Petitioner failed to present any material evidence of an

improper purpose. Rather, petitioner relied solely on evidence of Contrux's undercapitalization in an accounting sense. The only viable evidence on the critical issue of Telecom's purpose as to Contrux's responsibility to potential tort claimants was that Contrux purchased substantially more liability insurance than required by federal financial responsibility regulations.

Petitioner's contention that the court of appeals should have applied a purely objective test of capitalization to determine if Contrux was operated with an improper purpose is inconsistent with Missouri law, which requires that the improper purpose element be evaluated in relation to the type of claimant. Consequently, his position is fundamentally at odds with the principal of federalism this Court established in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Because it is essential to understand the state law principles that guided the court of appeals in ruling on Telecom's motion to dismiss, the discussion of state law precedes the analysis of the court of appeals' application of federal law and procedure to the facts of this case.

I. THE COURT OF APPEALS PROPERLY APPLIED DUE PROCESS PRINCIPLES AND MISSOURI LAW WHEN IT DISMISSED PETITIONER'S AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION.

A. Petitioner Cannot Establish That Telecom Falls Within The Reach Of The Missouri Long-Arm Statute Unless He Proves Contrux Is Telecom's Alter Ego.

In order to establish personal jurisdiction over Telecom, petitioner first must establish that Telecom falls within the reach of Missouri's Long-Arm Statute. Mo. Ann. Stat. § 506.500 (Vernon Supp. 1988). Petitioner's

only purported basis for personal jurisdiction over Telecom is his claim that Telecom is the alter ego of Contrux, a company whose employee allegedly committed a tort in Missouri. Petitioner does not contend Telecom committed a tort or transacts business in the state of Missouri. Petitioner relies upon the single-act tort section of the Missouri Long-Arm Statute which creates jurisdiction over out-of-state corporations that commit a tort within the state. Mo. Ann. Stat. § 506.500.3 (Vernon Supp. 1988); Appendix A.

Petitioner has the burden of proving that the district court has personal jurisdiction over Telecom pursuant to the Missouri Long-Arm Statute and that personal jurisdiction is consistent with constitutional due process principles; he cannot shift that burden to Telecom. Fed. R. Civ. P. 12(b)(2); *see infra* pp. 16, 17, 24. To do so, petitioner must prove Contrux is Telecom's alter ego. Petitioner failed to offer any evidence supporting the improper purpose element of his cause of action.

B. The Court Of Appeals Dismissed Petitioner's Amended Complaint Because He Failed To Present Evidence To Support The Improper Purpose Element Of His Action To Pierce The Corporate Veil.

In order to pierce Contrux's corporate veil, petitioner must plead and prove (1) that Telecom controlled Contrux with respect to the transaction attacked, (2) that Telecom controlled and dominated Contrux with an improper purpose, to justify wrong, to defeat public convenience, or to perpetrate fraud, and (3) that the above mentioned control and improper purpose were the proximate cause of petitioner's injury. *A.L. Lab., Inc. v. Philips Roxane, Inc.*, 803 F.2d 378, 385 (8th Cir. 1986), *cert. denied*, 481 U.S. 1007 (1987); *Collet v. American National Stores, Inc.*, 708 S.W.2d 273, 284 (Mo. App. 1986).

The Petition for Writ of Certiorari focuses primarily on the improper purpose element of petitioner's purported cause of action. The courts below both presumed for purposes of the motion to dismiss that petitioner had established prima facie evidence that Telecom controlled Contrux and that Contrux was undercapitalized. Petitioner's Appendix, pp. 5A, 20A. The court of appeals did not determine whether plaintiff satisfied the proximate cause element of his cause of action.

The court of appeals dismissed petitioner's amended complaint because he failed to demonstrate Contrux was operated with an improper purpose as to him. Each element of petitioner's cause of action – control, improper purpose, and proximate cause – must relate to the other if petitioner is to demonstrate that Contrux is the alter ego of Telecom. *Collet*, 708 S.W.2d at 284. Petitioner has failed to present any evidence that Telecom exercised control over Contrux to further an improper purpose that caused his injury.

1. Under Missouri Law, Petitioner Must Prove An Improper Purpose, Not Mere Undercapitalization.

Consistently, Missouri courts have held that to pierce the veil of a subsidiary corporation, more than mere insolvency is required. To establish his cause of action, petitioner must prove that Telecom controlled and operated Contrux "with an improper purpose, to justify wrong, to defeat public convenience, or to perpetrate fraud." *Collet*, 708 S.W.2d at 273. Missouri courts will not disregard the corporate form unless equity demands it. The *Collet* court held:

> Ordinarily, the separate legal identities of two corporations will be protected. This is true even where one corporation owns a part or all of the other. However, instances do occur when one corporation shows such domination and control

> over another that the latter corporation becomes a mere adjunct or "alter ego" of the first. In such a situation, *when the formal corporate separateness in the arrangements between the two corporations is devised or used to accomplish a fraud, injustice, or some unlawful purpose, then the separate formal corporate structures will be ignored.*

(Emphasis added). *Collet*, 708 S.W.2d at 283-4 (citing *Camelot Carpets v. Metro Distributing Co.*, 607 S.W.2d 746, 749 (Mo. App. 1980)).

The corporate form will be disregarded only when the control exercised by the parent corporation was used improperly. For example:

> [i]f the corporate affiliation is devised or being used to perpetrate fraud or injustice or accomplish some unlawful purpose, equity will interpose to tear down technical legal barriers and pierce through the corporate veil.

Lawton-Byrne-Bruner Ins. Agency Co. v. Stiers Bros. Const. Co., 186 S.W.2d 480, 484 (Mo. App. 1945), *rev'd on other grounds*, 190 S.W.2d 880 (Mo. 1945). Missouri courts will pierce the veil of a corporation that intentionally "operated without sufficient funds to meet obligations to those who must deal with it." *May Dept. Stores v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 55 (Mo. 1937).

In *Collet*, the parent corporation had its subsidiary enter a 25-year lease when the parent knew the subsidiary was insolvent. *Collet*, 708 S.W.2d at 287. The *Collet* court found an improper purpose because the subsidiary's undercapitalization was "beyond cavil" and "far below industry standards," and "this was the culmination of a course of conduct which made it impossible for [the corporate subsidiary] to operate and satisfy its obligations, and justifies piercing the corporate veil." *Id.* Additionally, there was "ample evidence of both undercapitalization and the stripping of assets." *Id.* at 286.

The Missouri Court of Appeals reached a much different result in a case where the subsidiary was undercapitalized, but where there was no evidence of an improper purpose as to the plaintiff. *C.C. Dillon Co. v. Robinson*, 636 S.W.2d 380 (Mo. App. 1982). The *C.C. Dillon* court held:

> It may be conceded that Chasyl was controlled and 100% owned by Robinson and his wife, but such ownership and control does not of itself authorize piercing the corporate veil. It may also be conceded that Chasyl was minimally financed. Whatever the impact of that fact on other parties, we are unable to see how it establishes an improper purpose *as to this plaintiff.*

Id. at 383 (emphasis added). Therefore, the question is not how much capital Contrux had available, but whether it prepared to meet potential tort claims in a financially responsible manner.

In each case cited by petitioner in which a court sitting in Missouri disregarded the corporate form because of undercapitalization, there was evidence that the parent corporation intended to evade obligations to business creditors. *See H.H. Robertson Co. v. V.S. DiCarlo Gen. Contr., Inc.*, 789 F. Supp. 998 (E.D. Mo. 1992) (shareholders transferred substantially all assets of corporation to related entity thereby rendering first corporation unable to meet financial obligations under subcontract); *Omaha Indemnity Co. v. Royal American Managers, Inc.*, 755 F. Supp. 1451 (W.D. Mo. 1991) (court found evidence that the parent stripped assets from the subsidiary and undercapitalized it in relation to the magnitude of the subsidiary's undertaking); *Grote Meat Co. v. Goldenberg*, 735 S.W.2d 379 (Mo. App. 1987) (wholesale meat seller recovered from sole shareholder of corporate meat buyer where shareholder transferred money out of corporation's capital account immediately before meat purchase);

Collet, 708 S.W.2d 273 (insolvent subsidiary entered 25-year lease). None of the Missouri cases on which petitioner relies involve an action by a tort claimant to pierce the corporate veil of a subsidiary corporation. Undercapitalization is relevant in the above cases because, in each, the defendant corporation intentionally incurred obligations it knew it could not satisfy. Companies prepare for tort liability with insurance, an asset not available to trade creditors. Regardless of Contrux's capitalization, it is apparent that it was operated with sufficient assets to purchase more liability insurance than required by federal regulations.

Petitioner incorrectly suggests the court of appeals should have adopted an objective test in which undercapitalization, without more, would satisfy the improper purpose element of his cause of action. Petitioner's proffered analysis is inconsistent with Missouri law and, therefore, inconsistent with the concept of federalism. A federal court sitting in diversity must apply the law of the state as declared by the state's highest court, and may not exercise independent judgment as to what the law of the state should be. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

It would be contrary to Missouri law for the Court to adopt an objective test of undercapitalization for purposes of establishing the improper purpose element of the cause of action. The court of appeals has held that to pierce the corporate veil of a subsidiary, the plaintiff must plead and prove that "equity requires that the parent and subsidiary be treated as one." *A.L. Lab., Inc. v. Philips Roxane, Inc.*, 803 F.2d 378, 385 (8th Cir. 1986), *cert. denied*, 481 U.S. 1007 (1987). In that case, the court of appeals applied the same three part test adopted by the *Collet* court. *Id.*

Missouri common law requires something more than mere insolvency to pierce the corporate veil. That "something more" exists when a corporation intentionally incurs obligations that it knows it cannot satisfy. *Collet*,

708 S.W.2d 273. As one court noted, "The prospect of an unsatisfied judgment looms in every veil piercing action. . . . Thus, if an unsatisfied judgment is enough for the 'promote injustice' feature of the test, then *every* plaintiff will pass on that score." (Emphasis in original). *Sea-Land Services, Inc. v. Pepper Source*, 941 F.2d 519 (7th Cir. 1991). Despite ample opportunity to do so, petitioner failed to present evidence that Contrux or Telecom attempted to avoid their obligations to tort claimants such as him.

2. As A Matter Of Law, Contrux Was Not Operated With An Improper Purpose.

Contrux was not operated with an improper purpose as to petitioner. Petitioner failed to present any evidence that Telecom or Contrux improperly attempted to evade financial responsibility for petitioner's tort claim or tort claims generally. The only evidence regarding Telecom's purpose as to Contrux's responsibility for tort claims is that Contrux exceeded federal financial responsibility regulations that were enacted to provide protection for personal injury tort claimants such as petitioner. Petitioner's Appendix, p. 13A. The only improper purposes petitioner claims are that Contrux was undercapitalized and that Telecom formed Contrux as a non-union carrier.[2] Neither claim is sufficient to show an improper purpose.

Contrux is a motor carrier governed by the Interstate Commerce Code. 49 U.S.C. § 10101. Federal regulations

---

[2] In both his initial complaint and his amended complaint, petitioner asserted Telecom's "sole purpose" in creating Contrux was to establish a non-union trucking company to take business from Specter Red Ball, a unionized subsidiary plagued with labor problems. The factual inaccuracy of this allegation aside, the district court ruled that such a purpose is not improper. Petitioner's Appendix, p. 39A. Moreover, this statement is an admission that Contrux was not established for the purpose of evading tort liability.

define the "appropriate level of financial responsibility" for motor carriers such as Contrux. 49 C.F.R. § 387.1; Appendix C. The district court and the court of appeals were required to take judicial notice of the regulations. 44 U.S.C. § 1507; *Northern Heel Corp. v. Compo Industries, Inc.*, 851 F.2d 456, 468 (1st Cir. 1988); *Crimm v. Mo. Pac. R.R. Co.*, 750 F.2d 703, 710 (8th Cir. 1984); Fed. R. Evid. 201.

At the time of the accident, federal financial responsibility regulations required Contrux to purchase between $500,000 and $1,000,000 of liability insurance or to obtain a written decision, order or authorization from the Interstate Commerce Commission authorizing Contrux to self-insure.[3] The regulations did not require Contrux to create large cash reserves if it purchased $500,000 to $1,000,000 of liability insurance. 49 C.F.R. §§ 387.7; 387.9. Contrux did much more to prepare for potential tort claims than required by federal law. Not only did Contrux purchase a $1,000,000 primary liability insurance policy that fully satisfied the financial responsibility regulations, it also purchased a $10,000,000 excess liability policy. Thus, at the time of the accident, Contrux had in effect more than ten times the highest amount of liability insurance required by federal law.

The purpose and scope of the regulations is "to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways." 49 C.F.R. § 387.1; Appendix C. The regulations are promulgated pursuant to 49 U.S.C. § 10101. *See* Appendix D. Among the reasons the regulations were promulgated were "to promote safe, adequate,

---

[3] The higher $1,000,000 limit applied only to motor carriers transporting hazardous materials. There was no evidence before the courts regarding the cargo Contrux was carrying at the time of the accident. For purposes of the motion to dismiss, however, the Court may assume the $1 million limited applied. 49 C.F.R. § 387.9; Appendix C.

economical and efficient transportation" and to "allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and travelling public." 49 U.S.C. § 10101(a); Appendix D.

Most trucking companies, particularly small, full truckload ("TL") carriers such as Contrux, do not have sufficient assets to meet the federal financial responsibility guidelines or to prepare for potential tort liability without insurance.[4] The regulations establish not only what is necessary to reasonably protect the public, they establish a national standard for financial responsibility that allows interstate motor carriers to operate without insurmountable barriers to market entry. Congress recognized the need for trucking regulations that would protect the public and allow safe, economical and efficient transportation.

In determining that Contrux properly prepared to meet its potential obligations to tort claimants, the court of appeals considered all of Contrux's undisputed assets, including its $11,000,000 of liability insurance.[5] Contrux's purchase of more than ten times the liability insurance

---

[4] TL motor carriers ship goods from a point of origin to a final destination without dropping off or redistributing their loads at regional hubs. Less-than truckload ("LTL") carriers pick up loads and transport them to a regional hub where the loads are redistributed among trucks headed to various final destinations.

[5] Telecom does not claim that liability insurance coverage is an asset in the accounting sense. Nevertheless, liability coverage is the customary method of providing for the satisfaction of negligence claims. When determining whether a company had an improper purpose to evade tort claimants, therefore, it is appropriate to consider the insurance coverage the company obtained. To disregard such coverage under a hypertechnical accounting analysis would be to elevate form over substance.

required by federal law is the only evidence of Telecom's purpose as to petitioner or other tort claimants, and negates any suggestion of an improper purpose. Far from violating any "statutory or other positive legal duty", Contrux substantially exceeded the requirements of federal law. *Collet* at 284.

Petitioner has attempted to obscure the undisputed evidence that Contrux surpassed federal financial responsibility regulations by claiming that Contrux's excess carrier Integrity had "wobbly knees for years before the receivership." *See* Petitioner's Appendix, p. 9A. Petitioner further implies that Contrux knew Integrity was in financial trouble. Petitioner's unsupported allegations are irrelevant for two reasons. First, the court of appeals found "Contrux unquestionably had good basic coverage of $1,000,000 from the Insurance Company of Pennsylvania, an insurer whose solvency is not questioned." Petitioner's Appendix, p. 9A. The $1,000,000 primary policy, by itself, *satisfied or exceeded* the financial responsibility regulations. *See* 48 C.F.R. § 387.9 Thus, the court of appeals' holding that Contrux was financially responsible would stand even if Contrux had not purchased the additional insurance from Integrity. Second, plaintiff bases his allegation that Contrux knew Integrity had long-standing financial problems on the fact that Integrity did not receive a Best's rating in 1985 and 1986. The court of appeals correctly noted, however, that Contrux purchased its insurance in 1983 and renewed it in 1984; the accident occurred in 1984 before the 1985 and 1986 Best's reports were released. Petitioner's Appendix, pp. 9A, 10A.

Contrary to petitioner's representations, the court of appeals did not hold that the purchase of insurance, regardless of source or amount always will demonstrate the lack of an improper purpose. The court of appeals held only that where a federal regulation defines financial responsibility for Contrux with respect to potential

tort liability and where the petitioner has failed to present evidence that Contrux was operated with an improper purpose to evade such claims, it would be inconsistent to attribute a bad motive or insufficient financial responsibility to Telecom when Contrux's financial responsibility exceeded the applicable standard. Unlike the court in *Atlas Construction Co. v. Slater*, 746 P.2d 352 (Wyo. 1987), the court of appeals in this case could rule as a matter of law that Contrux's insurance was sufficient to prove it was not operated with an improper purpose. The court was required to take judicial notice of the amount of insurance required by federal regulations to establish financial responsibility in the trucking industry, and petitioner did not come forward with any evidence of an improper purpose as to tort claimants.

C. Personal Jurisdiction Over Telecom Is Inconsistent With Fundamental Principles Of Due Process.

Petitioner has failed to prove that personal jurisdiction over Telecom is consistent with fundamental principles of due process. The fundamental due process requirements applicable in the context of personal jurisdiction are set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1944). In that case, the Court held that to subject a non-resident defendant to a forum's personal jurisdiction, the non-resident must have certain minimum contacts with the jurisdiction such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Id.* at 316.

Two separate and distinct elements of the minimum contacts standard have evolved from *International Shoe* and its progeny. First, a non-resident's conduct must be such that it "purposefully avails itself of the privilege of conducting activities within the forum state." *Hanson v. Denckla*, 357 U.S. 235 (1958). Second, the defendant's

contacts with the forum state must be such that it should "reasonably anticipate being hailed into court there." *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). This latter element is primarily a reiteration of the basic fairness standard of *International Shoe*.

Petitioner essentially claims that Telecom is subject to jurisdiction in the State of Missouri because Telecom is the sole shareholder of a corporation allegedly established to further the "improper purpose" of forming a non-union trucking company and because the subsidiary allegedly is insolvent.[6] Under the minimum contacts analysis, it is unreasonable to believe that Telecom purposefully availed itself of the privilege of conducting activities in Missouri by forming a separate Texas corporation which had its principal place of business in Illinois and which, independent from Telecom, exceeded federal financial responsibility regulations in order to protect against personal injury claims. Further, Telecom could not reasonably anticipate being haled into court in the State of Missouri because it had no control over the day-to-day operations of Contrux and was not involved in any of the acts that led to the alleged truck accident.[7]

---

[6] The district court correctly ruled that there is nothing improper about forming a non-union trucking company. Petitioner's Appendix, p. 39A. In an effort to create an issue where none exists, petitioner grossly mischaracterizes the relationship between Contrux, Telecom and Specter Red Ball. Contrux and Specter Red Ball serviced entirely different market segments. Contrux was a full truck load ("TL") motor carrier. Specter Red Ball, Telecom's other trucking subsidiary was one of the nation's largest less-than-truckload ("LTL") carriers and it did not compete with Contrux.

[7] Although petitioner alleges that Telecom controlled Contrux, he does not allege that control was exercised with respect to the transaction attacked. *Collet*, 708 S.W.2d at 284. Petitioner does not allege Telecom controlled the day-to-day operation of

D. The Court Of Appeals' Dismissal Of Petitioner's Complaint Against Telecom Is Consistent With Public Policy As Established By Missouri Courts.

Petitioner's theory seems to be that the statutory limited liability of corporate shareholders should be cast aside whenever a corporation does not have enough money to pay an obligation. Underlying his theory is the illogical notion that corporate limited liability should be permitted except when it is actually needed. Such a position is legally unsupportable and is inconsistent with public policy.

Corporate shareholders are given limited liability to protect them in precisely those situations when the corporation is unable to pay all of its debts. Corporations are designed to provide a limited risk vehicle to encourage economic growth and investment. The purpose of corporations is to allow shareholders to start a business without risking their entire wealth. The court of appeals stated:

> This is a conscious decision made by the law of every state to encourage business in the corporate form. Obviously, the decision has its costs. Some injuries are going to go unaddressed because of the insolvency of the corporate defendant immediately involved, even when its shareholders have plenty of money.

Petitioner's Appendix, pp. 2A, 3A. To the rule of limited liability, Missouri courts allow few exceptions.

The Court should follow Missouri law and honor substance over form. Petitioner's liability theory asks the Court to elevate form over substance. Petitioner suggests

---

Contrux's trucking business or the actions of Contrux's driver, Satterfield.

the district court and court of appeals should have considered only assets that appear on Contrux's balance sheet when analyzing Contrux's financial responsibility for a tort claim. He would have the Court ignore Contrux's compliance with federal financial responsibility regulations, the only evidence regarding Contrux's intentions with respect to tort claimants.

This is not the case to abandon the traditional limited liability of corporate shareholders provided by Missouri law. Petitioner would like the Court to ignore his recovery of nearly $1,000,000 from Contrux's primary liability insurance carrier.[8] Petitioner wants more and contends that, in some manner, Telecom attempted to use Contrux to avoid responsibility for tort claims. His position is inconsistent with the fact of his settlements.

II. THE COURT OF APPEALS PROPERLY GRANTED TELECOM'S MOTION TO DISMISS PETITIONER'S AMENDED COMPLAINT PURSUANT TO RULES 12(b)(2) AND 12(b)(6).

A. The United States Supreme Court Should Not Grant The Petition For Writ Of Certiorari Because Petitioner Did Not Oppose The Burden Of Proof Adopted By The Lower Courts.

The jurisdiction of the United States Supreme Court on a petition for writ of certiorari is discretionary. The Court's jurisdiction should not be exercised to determine issues petitioner failed to raise in the lower courts, or to revisit issues that were resolved in his favor. Petitioner did not argue on appeal or in his petition for rehearing that the district court or the court of appeals applied an

---

[8] At oral argument, petitioner admitted receiving compensation for his injuries from Contrux's primary liability carrier and from Flexi-Van as part of a partial settlement.

incorrect evidentiary standard and burden of proof to Telecom's motion to dismiss.

In both the district court and the court of appeals, petitioner argued that he should be required to establish only prima facie evidence of personal jurisdiction to defeat Telecom's Rule 12(b)(2) motion to dismiss. Indeed, petitioner admitted, "the plaintiff must submit sufficient facts on the basis of the complaint, taken as true, and affidavits, testimony or other documents to support a prima facie showing of jurisdictional facts." Brief of Appellant, p. 16. While the court of appeals agreed the prima facie standard was appropriate, it was not required to apply a standard of proof to the motion because petitioner did not present any evidence of an improper purpose with respect to him. Where there is a complete absence of proof, the standard of proof becomes essentially an academic question.

B. Petitioner Failed To Present Any Evidence That Contrux Was Operated With An Improper Purpose As To Petitioner.

Telecom moved to dismiss petitioner's Complaint and Amended Complaint under both Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). On a Rule 12(b)(2) motion, petitioner has the burden of proving his jurisdictional allegations. *Infra* pp. 24-25. Because the jurisdictional and liability issues are related, petitioner must establish prima facie evidence supporting the elements of his liability theory. *Supra* p. 7. The court of appeals granted Telecom's motion because petitioner failed to provide any evidence that Contrux was operated with an improper purpose as to him or other tort claimants.

The district court and the court of appeals determined for purposes of Telecom's motion that petitioner had established prima facie evidence that Telecom controlled Contrux and that Contrux was undercapitalized. Petitioner, however, did not present any evidence of an

improper purpose to avoid responsibility for tort claims. Petitioner's Appendix, p. 13A.

The court of appeals assumed that Contrux began its life with an anemic balance sheet and now is insolvent.[9] Telecom did not present evidence to the contrary because, on a motion to dismiss, factual disputes are resolved in petitioner's favor.[10] Because petitioner did not dispute Telecom's affidavit demonstrating that Contrux carried $11,000,000 of liability insurance and because at oral argument petitioner admitted the insurance existed, the court of appeals accepted that evidence as true.[11] The court of appeals then took judicial notice of federal regulations, 49 C.F.R. §§ 387.7, 387.9, that require interstate trucking companies to carry $500,000 to $1,000,000 in liability insurance coverage to qualify as financially responsible. With respect to Contrux's insurance, the court of appeals stated:

> In the first place, Contrux unquestionably had good basic coverage from the Insurance Company of Pennsylvania, an insurer whose solvency is not questionable. . . . it is beyond dispute that Contrux had insurance, and that it was considered financially responsible under the applicable federal regulations. . . . There is no evidence that Telecom or Contrux knew that

---

[9] Petitioner provided the district court with the affidavit of John Meara, an accountant who opined that Contrux was insolvent and undercapitalized. The Meara affidavit did not discuss Contrux's insurance.

[10] For purposes of this motion only, Telecom does not contest the district court's conclusion that petitioner established prima facie evidence of undercapitalization.

[11] Telecom provided the district court with the affidavit of Jack Anderson, Contrux's former president, which described Contrux's $11 million in liability insurance coverage and attached as exhibits the declaration pages for the various insurance policies.

> the [excess liability] insurance company was going to become insolvent, and no reason, indeed, that we can think of why anyone would want to buy insurance from a company that he thought would become insolvent.

Petitioner's Appendix, pp. 9A, 13A.

Despite his thorough discovery efforts, petitioner did not present any evidence of Contrux's ability to address tort claims. The Meara affidavit did not even discuss Contrux's insurance coverage or express an opinion on the purpose or intention with which Contrux was operated as to tort claimants. Instead, it focused on whether Contrux satisfied a technical accounting definition of the term "undercapitalization." It was petitioner's decision during the process of discovery and repleading his case to focus solely on "undercapitalization" as opposed to the purpose with which Contrux was operated as to tort claims.

Evidence of undercapitalization, without more, does not establish an improper purpose. *Supra* pp. 8-12. Petitioner's contention that Contrux was insolvent and controlled by Telecom, without evidence of an improper purpose as to tort claimants, is irrelevant in this case because Contrux was deemed financially responsible for tort claims under federal law. *Supra* pp. 12-16; Petitioner's Appendix, p. 12A.

The only evidence of purpose as to tort claimants is Contrux's insurance. Because Contrux's $11,000,000 in insurance coverage substantially exceeded federal financial responsibility regulations, the court of appeals concluded as a matter of law that Contrux was not operated with an improper purpose to evade tort claims. Petitioner's Appendix, p. 13A. Indeed, Contrux's $1,000,000 primary liability policy with the Insurance Company of Pennsylvania was itself sufficient to meet the upper limit of the federal financial responsibility regulations. See, 49 C.F.R. § 387.9. It would be inconsistent to hold that there

was an attempt to evade tort claims when Contrux was deemed financially responsible in that regard by the federal agency governing the trucking industry.

Petitioner's contention that the court of appeals erred by weighing the credibility and quantity of the parties' evidence under a preponderance of the evidence standard is unsupported by the facts or the court of appeals' opinion. The court of appeals dismissed petitioner's complaint against Telecom only after determining that, "no rational trier of fact could find personal jurisdiction over [Telecom]." Petitioner's Appendix, p. 11a. Regardless of the appropriate burden of proof for a Rule 12(b)(2) motion to dismiss, the court of appeals based its holding on the fact that petitioner failed to present evidence that Contrux was operated in an attempt to avoid responsibility for tort claims. Petitioner's Appendix, p. 13A.

C. The District Court And The Court Of Appeals Adopted The Prima Facie Evidence Standard Urged By Petitioner.

The lower courts correctly adopted the prima facie evidence standard suggested by petitioner when they granted Telecom's motion to dismiss petitioner's complaint for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(2), (6). The court of appeals did not require petitioner to satisfy the more stringent preponderance of the evidence standard, or, in fact, any evidentiary standard. Quantum of proof is truly not an issue because petitioner failed to provide any evidence supporting the improper purpose element of his cause of action. Nevertheless, the court of appeals stated quite clearly that it adopted the prima facie evidence standard and it resolved all factual disputes in petitioner's favor. The court of appeals described its analysis as follows:

> "We look at the facts relevant to the issue of jurisdiction in the light most favorable to Radaszewski, give him the benefit of all reasonable inferences from these facts, and deny the motion to dismiss if the record, viewed in this way, raises any genuine issue of fact material to the issue of jurisdiction."

Petitioner's Appendix, p. 12A.

On a Rule 12(b)(2) motion to dismiss, the Court must evaluate the jurisdictional facts presented by the parties to determine if personal jurisdiction lies. Whether jurisdiction lies is a mixed question of law and fact. *Thompson v. Ecological Science Corp.*, 295 F. Supp. 1307, 1310 (E.D. Ark. 1969), *rev'd on other grounds*, 421 F.2d 467 (8th Cir. 1970). A motion to dismiss for lack of personal jurisdiction is often a test of the plaintiff's actual proof. Once a jurisdictional defense properly has been raised, the plaintiff bears the burden of demonstrating contacts with the forum state sufficient to give the court in personam jurisdiction; he cannot shift that burden to the defendant. *Dakota Industries v. Dakota Sportswear*, 946 F.2d 1384, 1387 (8th Cir. 1991); *Institutional Food Mktg. Assoc. v. Golden State Strawberries, Inc.*, 747 F.2d 448, 452 (8th Cir. 1984); *Block Industries v. D.H.J. Industries, Inc.*, 495 F.2d 256, 259 (8th Cir. 1974) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936)); *Timeshare Vacation Club v. Atlantic Resorts, Limited*, 735 F.2d 61 (3rd Cir. 1984); *Hanline v. Sinclair Global Brokerage Corp.*, 652 F. Supp. 1457, 1459 (W.D. Mo. 1987); Fed. R. Civ. P. 12(b)(2). That burden normally is not a heavy one, although the standard of proof varies depending on the procedure used by the court in making its determination. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1351 (1990).

The district court may consider affidavits, pleadings and other evidence or it may hold a full evidentiary

hearing when it considers a Rule 12(b)(2) motion to dismiss. *Welsh v. Gibbs*, 631 F.2d 436 (6th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); *Publications Group, Inc. v. Am. Soc. of Heating, Refrig. and Air Conditioning Engineers, Inc.*, 566 F. Supp. 316, 318 (D. Conn. 1983). In this case, the district court considered only written materials submitted by the parties. The parties agree that because the district court relied solely on written materials, petitioner was required to establish personal jurisdiction by prima facie evidence. *See Watlow Elec. Mfg. v. Patch Rubber Co.*, 838 F.2d 999, 1000 (8th Cir. 1988); *Welsh*, 631 F.2d 436.

Under the prima facie evidence standard, the court is required to view the facts in the light most favorable to the non-moving party and resolve all factual conflicts in that party's favor. *Dakota Industries*, 946 F.2d at 1387 (citing *Nieman v. Rudolf Wolff & Co., Ltd.*, 619 F.2d 1189, 1190 (7th Cir. 1980), *cert. denied*, 449 U.S. 920 (1980)). On a motion to dismiss for lack of personal jurisdiction, the district court is required to determine if the undisputed facts and the facts resolved in the plaintiff's favor are sufficient to prove jurisdiction. *Dakota Industries*, 946 F.2d at 1387; *Watlow Elec. Mfg.*, 838 F.2d at 1000; *Welsh*, 631 F.2d 436. If not, the district court may dismiss the complaint for lack of personal jurisdiction. Implicit in the rule that factual disputes must be resolved in favor of the non-moving party is the principle that the district court can and must consider undisputed and admitted facts as part of its analysis. *See Welsh*, 631 F.2d 436; *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977). To ignore undisputed facts would be an affront to the principle of judicial economy. The prima facie standard is an evidentiary standard, not a mere examination of the pleadings. *Ring v. First Interstate Mortg., Inc.*, 984 F.2d 924, 926 (8th Cir. 1993).

D. The Eighth Circuit Is Not In Conflict With Other Circuit Courts Regarding The Appropriate Standard To Apply On Rule 12(b)(2) And Rule 12(b)(6) Motions To Dismiss.

There is no conflict between the Eighth Circuit and the circuit courts referred to by petitioner regarding the standard to be applied on a Rule 12(b)(2) and 12(b)(6) motion to dismiss. The district court and the court of appeals adopted a prima facie evidence standard when they ruled on Telecom's motion. Petitioner's Appendix, pp. 12A, 19A. Nevertheless, the court of appeals was not required to *apply* a burden of proof to the facts because petitioner did not provide any evidence of an improper purpose.

The court of appeals has applied the prima facie evidence standard in other cases relating to personal jurisdiction. *See Dakota Industries v. Dakota Sports Wear*, 946 F.2d 1384 (8th Cir. 1991); *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211 (8th Cir. 1977). As petitioner acknowledges, this same prima facie evidence standard has been adopted in other circuits. *See Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899 (2nd Cir. 1981); *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977); *Bialek v. Racal-Milgo, Inc.*, 545 F. Supp. 25 (S.D.N.Y. 1982).

Contrary to petitioner's unfounded accusation, the court of appeals did not reject the prima facie standard as confusing, but described it as a "somewhat confusing formulation." Petitioner's Appendix, p. 11A. Regardless of the court of appeals' opinion of the prima facie standard, the standard it adopted in its holding is consistent with the prima facie evidence standard applied by other courts. Further, it is clear that petitioner did not present any evidence of improper purpose to which the court could apply a burden of proof. Petitioner's Appendix, pp. 11A-13A.

E. The Court Of Appeals Did Not Improperly Transform Telecom's Motion To Dismiss Into A Summary Judgment Motion.

The court of appeals did not improperly "transform" respondent's Rule 12(b)(2) motion into a Rule 56 summary judgment motion. In cases where the jurisdictional and liability facts are related, a Rule 12(b)(2) and 12(b)(6) motion can be handled in a manner similar, though not identical, to a Rule 56 motion. The prima facie evidence analysis is similar to the first part of the Rule 56 analysis; both require the district court to resolve all factual disputes in favor of the non-moving party. Here, however, there is no evidence the court of appeals applied the evidentiary "prism" of a preponderance of the evidence standard to the facts of this case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). Indeed, it was unnecessary for the court of appeals to apply any evidentiary standard because as the court noted, "[petitioner] has made *no showing* of any issue of material fact with respect to the dishonesty or improper conduct element of the *Collet* test." (emphasis added) Petitioner's Appendix, p. 13A.

Petitioner has attempted to create a burden of proof issue where none exists. The court of appeals noted that Contrux has $11,000,000 in liability insurance, that the existence of this insurance was beyond dispute, that at least $1,000,000 in "good basic coverage" was still in force, that federal regulations set the industry standard for financial responsibility for companies such as Contrux, that Contrux exceeded those standards, and that the only "improper purpose" petitioner claimed was that Contrux was undercapitalized. Petitioner's Appendix, pp. 2A-14A. Petitioner did not present any evidence of an

improper purpose for the courts to weigh against the evidence that Contrux purchased substantial insurance to cover the claims of persons such as petitioner.

F. The Court Of Appeals And The District Court Did Not Violate Petitioner's Due Process Rights When They Dismissed His Complaint.

Petitioner's assertion that his due process rights have been violated is without substance. Although the Seventh Amendment entitles claimants to a jury trial in all actions at common law where the amount in controversy exceeds $20.00, claimants do not have the right to bring factually and legally unsupported claims. Petitioner was given an opportunity to present evidence on the narrow issue of the district court's personal jurisdiction over Telecom. Petitioner failed to provide any evidence of the critical improper purpose element of his cause of action and thereby failed to establish a prima facie case of jurisdiction.

G. Petitioner Was Aware Of The Evidentiary Nature Of The Proceedings On Telecom's Motion To Dismiss.

The procedural history of this case demonstrates the falsity of petitioner's claim that he was unaware of the evidentiary nature of the proceedings. After the court of appeals considered the district court's first dismissal of this case, it remanded the case to allow petitioner sixty days of additional discovery to prove the elements of his cause of action. Petitioner's Appendix, p. 33A. The court stated explicitly that to avoid dismissal petitioner would have to develop facts proving the second element of the *Collet* test and proving that Telecom's control of Contrux and improper purpose proximately caused an injury to him. *Id.*

Petitioner took full advantage of the sixty-day discovery period in an effort to obtain facts to support the elements of his purported cause of action. Petitioner took at least eight depositions, obtained numerous affidavits and examined countless documents. Petitioner chose to focus his efforts solely on the financial condition of Contrux. Based on the additional discovery, petitioner filed an amended complaint.

Telecom moved to dismiss petitioner's amended complaint for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(2) and 12(b)(6). Both Telecom and petitioner filed affidavits, deposition excerpts, and other information designed to provide the district court with a factual basis for its ruling. The only evidence petitioner presented that allegedly related to the improper purpose element of his cause of action was evidence that Contrux was undercapitalized in the accounting sense. After evaluating the information provided by the parties, the district court again granted Telecom's motion to dismiss without prejudice. Petitioner's Appendix, pp. 18A-27A.

This time, both parties appealed. Petitioner appealed the district court's order dismissing Telecom for lack of personal jurisdiction. Telecom appealed the portion of the district court's order designating the dismissal without prejudice. Both parties included factual material relevant to the issue of the district court's jurisdiction over Telecom in their joint appendix on appeal.

Not only was petitioner aware of the evidentiary nature of the proceedings, but he relied on a three volume joint appendix filed with his brief and urged the court of appeals to resolve all factual disputes in his favor. The thrust of petitioner's argument appears to be that the court of appeals should not have considered the only evidence that truly relates to Telecom's purpose as to Contrux's responsibility to tort claimants such as petitioner.

CONCLUSION

For the reasons stated herein, Konrad Radaszewski's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

ROBERT M. KROENERT
R. CHRISTOPHER ABELE
RICHARD W. MOREFIELD, JR.
MORRISON & HECKER
2600 Grand Avenue
Kansas City, Missouri 64108-4606
(816) 691-2600
(FAX) 474-4208

Attorneys for Respondent

APPENDIX A

506.500. Actions in which outstate service is authorized – jurisdiction of Missouri court applicable, when

1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

(1) The transaction of any business within this state;

(2) The making of any contract within this state;

(3) The commission of a tortious act within this state;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) The contracting to insure any person, property or risk located within this state at the time of contracting;

(6) Engaging in an act of sexual intercourse within this state with the mother of a child on or near the probable period of conception of that child.

2. Any person, whether or not a citizen or resident of this state, who has lived in lawful marriage within this state, submits himself to the jurisdiction of the courts of this state as to all civil actions for dissolution of marriage

or legal separation and all obligations arising for maintenance of a spouse, support of any child of the marriage, attorney's fees, suit money, or disposition of marital property, if the other party to the lawful marriage continues to live in this state or if a third party has provided support to the spouse or to the children of the marriage and is a resident of this state.

3. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

APPENDIX B

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and –

(1) in regulating those modes –

(A) To recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

(2) in regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe, and competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system; and (I) promote intermodal transportation; and

(3) in regulating transportation by motor carrier of passengers (A) to cooperate with the States on transportation matters for the purpose of encouraging the States to exercise intrastate regulatory jurisdiction in accordance with the objections of this subtitle; (B) to provide Federal procedures which ensure that intrastate regulation is exercised in accordance with this subtitle; and (C) to ensure that Federal reform initiatives enacted by the Bus Regulatory Reform Act of 1982 are not nullified by State regulatory actions.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

APPENDIX C

Subpart A – Motor Carrier of Property

§ 387.1 Purpose and Scope

This subpart prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce. The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

§ 387.3 Applicability

(a) This subpart applies to for-hire motor carriers operating motor vehicles transporting property in interstate or foreign commerce.

(b) This subpart applies to motor carriers operating motor vehicles transporting hazardous materials, hazardous substances, or hazardous wastes in interstate, foreign, or intrastate commerce.

(c) *Exception.* (1) The rules in this part do not apply to a motor vehicle that has a gross vehicle weight rating (GVWR) of less than 10,000 pounds. This exception does not apply if the vehicle is used to transport any quantity of Class A or Class B explosives, any quantity of poison gas, or highway route controlled quantity radioactive

materials, as defined in 49 CRF 173.403, in interstate or foreign commerce.

(2) The rules in this part do not apply to the transportation of nonbulk oil, nonbulk hazardous materials, substances, or wastes in intrastate commerce except highway route controlled quantity radioactive materials, as defined in 49 CFR 173.403.

§ 387.5 Definitions.

As used in this subpart –

Accident includes continuous or repeated exposure to the same conditions resulting in public liability which the insured neither expected nor intended.

Bodily injury means injury to the body, sickness, or disease including death resulting from any of these.

Cancellation of insurance the withdrawal of insurance coverage by either the insurer or the insured.

Endorsement an amendment to an insurance policy.

Environmental restoration restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measure taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

Evidence of security a surety bond or a policy of insurance with the appropriate endorsement attached.

Financial responsibility the financial reserves (e.g., insurance policies or surety bonds) sufficient to satisfy liability amounts set forth in this subpart covering public liability.

For-hire carriage transportation of property by motor vehicle except when –

(1) the property is transported by a person engaged in a business other than transportation; and

(2) The transportation is within the scope of, and furthers a primary business (other than transportation) of, the person.

In bulk the transportation, as cargo, of property, except Class A and B explosives and poison gases, in containment systems with capacities in excess of 3,500 water gallons.

In bulk (Class A and B explosives) – the transportation, as cargo, of any Class A or B explosives(s) in any quantity.

In bulk (poison gas) – the transportation, as cargo, of any poison gas in any quantity.

Insured and principal – the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier.

Insurance premium the monetary sum an insured pays an insurer for acceptance of liability for public liability claims made against the insured.

Motor carrier a common, contract, or private carrier of property by motor vehicle.

Property damage means damage to or loss of use of tangible property.

Public liability for bodily injury or property damage and includes liability for environmental restoration.

§ 387.7 Financial responsibility required.

(a) No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in § 387.9 of this subpart.

(b)(1) Policies of insurance, surety bonds, and endorsements required under this section shall remain in effect continuously until terminated. Cancellation may be effected by the insurer or the insured motor carrier giving 35 days' notice in writing to the other. The 35 days' notice shall commence to run from the date the notice is mailed. Proof of mailing shall be sufficient proof of notice.

(2) *Exception.* Policies of insurance and surety bonds may be obtained for a finite period of time to cover any lapse in continuous compliance.

(3) *Exception.* Mexican motor carriers may meet the minimum financial responsibility requirements of this subpart by obtaining insurance coverage, in the required amounts for periods of 24 hours or longer, from insurers that meet the requirements of § 387.11 of this subpart. A Mexican motor carrier so insured must have available for

inspection in each of its vehicles copies of the following documents:

i) The Certificate of Registration;

ii) The required insurance endorsement (Form MCS-90); and

iii) An insurance identification card, binder, or other document issued by an authorized insurer which specifies both the effective date and the expiration date of the temporary insurance coverage authorized by this exception. Mexican motor carriers insured under this exception are also exempt from the notice of cancellation requirements stated on Form MCS-90.

(c) Policies of insurance and surety bonds required under this section may be replaced by other policies of insurance or surety bonds. The liability of the retiring insurer or surety, as to events after the termination date, shall be considered as having terminated on the effective date of the replacement policy of insurance or surety bond or at the end of the 35 day cancellation period required in paragraph (b) of this Section, whichever is sooner.

(d) Proof of the required financial responsibility shall be maintained at the motor carrier's principal place of business. The proof shall consist of –

(1) "Endorsement(s) for Motor Carrier Policies of Insurance for Public Liability Under Section 29 and 30 of the Motor Carrier Act of 1980" (Form MCS-90) issued by an insurer(s);

(2) A "Motor Carrier Surety Bond for Public Liability Under Section 30 of the Motor Carrier Act of 1980" (Form MCS-82) issued by a surety; or

(3) A written decision, order, or authorization of the Interstate Commerce Commission authorizing the motor carrier to self-insure under § 1043.5 of this title, provided the motor carrier maintains a satisfactory safety rating as determined by the Bureau of Motor Carrier Safety under party 385 of this title.

(e) The proof of minimum levels of financial responsibility required by this section shall be considered public information and be produced for review upon reasonable request by a member of the public.

(f) All vehicles operated within the United States by motor carriers domiciled in a contiguous foreign country, shall have on board the vehicle a legible copy, in English, of the proof of the required financial responsibility (Forms MCS-90 or MCS-82) used by the motor carrier to comply with paragraph (d) of this section.

(g) Any motor vehicle in which there is no evidence of financial responsibility required by paragraph (f) of this section shall be denied entry into the United States.

§ 387.9 Financial responsibility, minimum levels.

The minimum levels of financial responsibility referred to in § 387.7 of this subpart are hereby prescribed as follows:

SCHEDULE OF LIMITS

[Public Liability]

	Commodity transported	July 1, 1981	January 1, 1985
(1) For-hire (in interstate or for foreign commerce)	Property (nonhazardous)	$500.00	$750,000
(2) For-hire and private (in interstate, foreign, or intrastate commerce).	Hazardous substances, as defined in 49 CFR 171.8, transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons; or in bulk Class A or B explosives, poison gas (Poison A), liquefied compressed gas or compressed gas; or highway route controlled quantity radioactive materials as defined in 49 CFR 173.403	1,000,000	5,000,000
(3) For-hire and private (in interstate or foreign commerce; in any quantity) or (in intrastate commerce: in bulk only).	Oil listed in 49 CFR 172.101; hazardous waste, hazardous materials and hazardous substances defined in 49 CFR 171.8 and listed in 49 CFR 172.101, but not mentioned din (2) above or (4) below.	500,000	1,000,000
(4) For-hire and private (in interstate of foreign commerce).	Any quantity of class A or B explosive; any quantity of poison gas (Poison A); or highway route controlled quantity radioactive materials as defined in 49 CFR 173.403	1,000,000	5,000,000

[1]The type of carriage listed under numbers (1), (2), and (3) apply to vehicles with a gross vehicle weight rating of 10,000 pounds or more. The type of carriage listed under number (4) applies to all vehicles with a gross vehicle weight rating of less than 10,000 pounds.

APPENDIX D

§ 1507. Filing document as constructive notice; publication in Federal Register as presumption of validity; judicial notice; citation

A document required by section 1505(a) of this title to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection as provided by section 1503 of this title. Unless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it. The publication in the Federal Register of a document creates a rebuttable presumption –

(1) that it was duly issued, prescribed, or promulgated;

(2) that it was filed with the office of the Federal Register and made available for public inspection at the day and hour stated in the printed notation;

(3) that the copy contained in the Federal Register is a true copy of the original; and

(4) that all requirements of this chapter and the regulations prescribed under it relative to the document have been complied with.

The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number.